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THE

# MYSORE CHIEF COURT REPORTS.

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## CASES DETERMINED

BY THE

## CHIEF COURT OF MYSORE.


REPORTED BY

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(ADVOCATE),

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*See* INDIAN EVIDENCE ACT.

*See* INDIAN LIMITATION ACT.

BREACH OF CONTRACT ACT—*Act XIII of* 1859—*Service for agricultural purposes for a definite period.*] The accused entered into an agreement with the complainant whereby, in consideration of the receipt in advance of a sum of Rs. 50, the former bound himself to work under the latter as an agricultural labourer for 3 years on a payment of Rs. 18 per annum besides food. The accused having failed to perform his part of the contract, the complainant charged him under section 2 of Act XIII of 1859. The Magistrate being of opinion that cases in which advances were made for agricultural purposes did not fall under the Act, dismissed the complaint. Against this order the complainant preferred a Revision Petition to the Chief Court:—*Held*, that the Magistrate was wrong in considering that the document did not come under the Act A contract for rendering agricultural labour for a definite period has been held valid and 3 years is not too long or objectionable.

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CIVIL PROCEDURE CODE, sections 2, 220, 373 and 588 —*Costs—Appeal—Withdrawal of suit—Appeal from order permitting unconditional withdrawal—Decree.*] In a suit for damages for defamation, the plaintiff applied for its withdrawal without permission to file a fresh suit and the Sub Judge granted the prayer and ordered the plaintiff to pay only a portion of the costs which the defendant had incurred. In appeal by the latter against the order relating to costs, it was contended that no appeal lay in such a case:—*Held*, that an order for the withdrawal of a suit without permission to file a fresh suit like an order rejecting a plaint came within the definition of a decree and was therefore appealable:—*Held further*, that the order as to costs was not sustainable as the expression "considering all the circumstances of the case" used by the Sub Judge was not acceptable as a reason within the meaning of section 220 of the Civil Procedure Code.

*M. Narasimiah* v. *D. Narasinga Rao* ... ... 9, Mys. Ch. Ct. 38

2. ——————————, sections 150, 375—*Razinama petition—Compromise or adjustment—Fresh issue raised therein—Inclusion of matters not the subject of suit—Section of the code applicable to such petitions—Court's power to entertain them—Decree in those terms, whether proper.*] In a suit for the recovery of produce of some land, the parties filed a razinama and agreed to abide by its terms. The Court received it and appointed a Commissioner to report on a

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matter referred to in the agreement. On receipt of the Commissioner's report, the Court passed a decree in accordance with it. *Held*:—(1) that the terms of the application fairly came under Section 150, Civil Pocedure Code; (2) that the Munsiff acted rightly in admitting the agreement and referring the question to the District Surveyor; (3) that the inclusion of other stipulations which did not clash and were not inconsistent with those relating to the matters in dispute, could not vitiate the agreement; and (4) that as the inclusion was not a condition precedent for the parties abiding by the agreement, those reliefs might be safely removed without subjecting the parties to any perceptible disadvantage.

*Siddalingappa* v. *Syed Ajimai Peer Shaw Khadri* 9, Mys. Ch. Ct. 22

3. ——————————, sections 253, 336, 337 A, 549 and 610—*Execution of Decree—Surety under section 337 A for payment of decree debt—Decree-holder—Remedy—Separate suit.*] It would seem from the omission of the Legislature to make an enactment against a surety under section 337 A of the Civil Procedure Code that the liability is enforceable by a suit and not by a summary remedy. *Balaji* v. *Ramasami*, *I. L. R.*, 7 *Madras*, 284; and *Arunachellam* v. *Arunachellam*, *I. L. R.*, 15 *Madras*, 203, followed; *Venkapa Naik* v. *Baslingapa*, *bin Kotra Basapa*, *I. L. R.*, 12 *Bombay*, 411; *Thirumalai* v. *Ramayyar*. *I. L R.*, 13 *Madras*, 1; and *Subjoo Das* v. *Balmakund Das*, *I. L. R.*, 23 *Calcutta*, 212, referred to.

*Muniramaiya* v. *Shamanna* ... ... 9, Mys. Ch. Ct. 49

4. ——————————, sections 253, 545, & 546—*Rules published under section 269, cl. (b) C. P. C. dated 12th October 1899—Surety—Enforcement of security—Surety to produce attached property or to pay damages in default—Execution of decree—Separate Suit.*] Two sureties had executed a bond undertaking to produce the attached property whenever required by Court and to pay damages out of their property in default. At the instance of the plaintiff (decree-holder), they were called upon to produce the property but failed. The plaintiff (decree-holder) applied to the Court to execute the decree against the sureties but the Munsiff refused. The plaintiff (decree-holder) has preferred this Revision Petition to the Chief Court:—*Held*, that the surety bond executed in this case did not come under any of the sections of the Civil Procedure Code and did not provide for the payment of the decree amount or any portion of it or for the due execution of any definite order of the Court but only made the sureties liable in damages and therefore the liability of the sureties could only be enforced by a regular suit. In the case reported at 22 Madras 268, it was held that the security should be enforced only by a regular suit, in spite of the fact that the security bond had been executed before the decree was passed in the original suit, on the ground that its terms did not bring it within the

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purview of section 253, Civil Procedure Code. It follows therefore that in the present case, the objection against enforcing the security in execution must be even stronger.

*Rajah Dod Nonjappa* v. *Chennabyrappa* ... 9, Mys. Ch. Ct. 68

5. ——————————, section 257 *A—Settlement of decree without sanction by taking a bond from a third party—Suit on bond—Not void under the section.*] *Held*, that following the decision of the Bombay High Court in 23 B., 502, section 257 A of the Code of Civil Procedure could not be applied where one of the parties to the agreement was not a party to the decree.

*Mahantha Devaru* v. *Sidde Gowda* ... 9, Mys. Ch. Ct. 64

6. ——————————, section 456.—*Promissory notes executed by mother—Suit thereon against her and her minor sons—Exparte decree without personal service of summons on any—Application to set aside the decree—Guardian of minor defendants not formally appointed by Court.*] Two promissory notes were executed in favour of plaintiffs by one Thimmanna and a suit was filed on them by plaintiffs making her and her minor sons defendants in the case. In the plaint, the mother (executant) was described as the guardian of her minor sons. An exparte decree was passed, none of the defendants having been personally served. Afterwards, the mother filed an application on behalf of her sons, alleging that they were not bound by the decree and also praying that the decree as regards them may be set aside. The Sub Judge dismissed the application. Thereupon, the mother on behalf of her sons, preferred this Miscellaneous Appeal.—*Held*, that as her interest and that of her sons could not be said to be identical in respect of the subject-matter and as no formal order was passed by the Court under section 456 of the Civil Procedure Code, constituting her a guardian *ad litem*, the exparte decree passed against the appellants was set aside.

*Chik Maddayya* v. *Venkataramanaiya* ... 9, Mys. Ch. Ct. 57

7. ——————————, sections 522, 525 and 622—*Arbitration without intervention of Court—Award—Application to file it—Decree in accordance with award—Appeal—Revisional Powers of Chief Court—Jurisdiction.*] Under an agreement entered into between the parties, they submitted their differences to panchayatdars for settlement. The latter gave an award. The plaintiffs applied to the Court under section 525, Civil Procedure Code, to have the award filed. The Munsiff passed a decree in accordance with the award after considering the objections urged by the defendants against it. The defendants preferred an appeal and it was contended on the other side that no appeal was allowable under the Code in the present

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case:—*Held*, that the decision of the Lower Appellate Court that the appeal was inadmissable under the limitation laid down by section 522, Civil Procedure Code, as the decree of first Court was in accordance with the award, was correct. *Also*, that there was no illegality or material irregularity in the Munsiff having accepted the award so as to justify an interference with the decree under section 622, Civil Procedure Code. Awards of arbitrators are such proceedings as the Courts ought to strive to uphold and not to go out of the way to discover flaws for rendering them ineffectual. (*See* observations in *Ram Dhan Singh* v. *Karan Singh*, I. L. R, XVIII, All., 414; Russel on Arbitrators, p. 300.)

*T. Venkatramanna Chetty* v. *K. Subbraya Chetty*... 9, Mys. Ch. Ct. 16

8. ———————, section 622—*Costs—Order directing plaintiffs to furnish security therefor—Suit in forma pauperis—Court of Revision—Powers.*] In a suit for partition in *forma pauperis*, the Court ordered, on the application of the defendant, that the plaintiff should furnish security for defendant's costs. The plaintiff preferred a revision under section 622, Civil Procedure Code:—*Held*, that the District Judge had jurisdiction to make the order and that there was no reason for holding that he had improperly exercised his discretion.

*Neelappa* v. *Somanna* .. .. .. 9, Mys. Ch. Ct. 75

COMPROMISE—*See* COURT FEES REGULATION, SCH. II, ART. 1 (*b*).

CONCUBINE—*See* MAINTENANCE.

CONTRIBUTION SUIT—*Co-owner of a jodi village suing another after division—Tank—Cost of repairs thereto—Payment thereof by the former to Government—When cause of action arises—Limitation—Land Revenue Code—Applicability to suits by private individuals.*] A co-owner of a jodi village sued another in 1902 for contribution of a portion of Rs. 548-6-7, which the former had paid to Government in 1895 for the cost of some repairs which the Government had executed to a tank in the village while it remained under their management, alleging that the cause of action arose in September 1901 when the defendant obtained a decree against plaintiff for his one-sixth of the said village. It was contended that the suit was barred by time:—*Held*, that the provisions of the Land Revenue Code which empowered Government to recover certain charges in the same manner in which arrears of Land Revenue might be recovered, did not apply to a claim made by a private individual and that the cause of action, if any, arose in June 1895 when the cost of repairs was paid by plaintiff to Government and therefore the suit was barred.

*Sreedhara Rao* v. *Sreenivasa Rao* ... ... 9, Mys. Ch. Ct. 35

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COSTS—*Discretionary powers of Court—Second Appeal—Reversal of decree of Lower Appellate Court—Effect.*] The plaintiff's suit was dismissed by the Munsiff but without costs. In appeal the District Judge reversed the decree. In Second Appeal the Chief Court reversed the decree of the Lower Appellate Court and dismissed the plaintiff's suit with costs throughout. The plaintiff has preferred this Civil Petition praying for a review of the order of the Chief Court regarding costs in the Munsiff's Court:—*Held*, that the fact that the Appellate Court allowed the plaintiff's claim in reversal of the decision of the Munsiff would have the effect of re-opening the case so far as it related to matters which were not finally adjudicated between the parties in the two Lower Courts. *Held further*, that the question of costs was one of discretion of the Courts, depending on their decision as regards the subject-matter of the suit.

*Hombi v. K. Sreenivasaiyengar* ... ... 9, Mys. Ch. Ct. 77

————*See* CIVIL PROCEDURE CODE, sections 2, 220, 378 and 588.

COURT FEES REGULATION, section 39—*Repayment of stamp and process fees to complainant—Obligatory on convicting Court to order the same.*] The Magistrate of Sagar convicted the accused of offences under sections 352, 355 and 323, Indian Penal Code and awarded a certain sum of money to the complainant being the expense of stamps incurred by him. The Sessions Judge, on appeal, disallowed the same as he was of opinion that the complainant had included some false counts in the charge. In the exercise of the Revisional Powers, the Chief Court:—*Held*, that section 39 of the Court Fees Regulation made it imperative on the convicting Court to order the repayment of the stamp and process fees and therefore the order of the Sessions Judge was set aside.

*In re. Ramiah* ... ... ... ... 9, Mys. Ch. Ct. 94

2. ————————, SCH. II, ART. 1 (*b*)—*Criminal Court—Compromise—Petition to report to Court—Stamp necessary.*] A petition informing the Court of the compounding of a case and requesting that it may be struck off, properly falls under Art. 1 (b), Schedule II of the Court Fees Regulation and should bear a stamp of eight annas. Reference under Stamp Act, section 46, I. L. R., 8 Madras, 15, followed.

*In re. Nanjunda Chari*, ... ... 9, Mys. Ch. Ct. 96

3. ————————, SCH., II, ART. 9—*See* MINOR'S RULES OF 1872.

CRIMINAL PROCEDURE CODE, section 33—*Fine—Imprisonment in default of payment thereof—Whether a Court is bound to pass such a sentence—Indian Penal Code, section 64.*] Section 64, Indian Penal Code,

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read with section 83, Criminal Procedure Code, does not appear to require that a sentence of imprisonment should be passed in default of payment of fine.

*In re. Bharmanna* ... ... ... ... 9, Mys. Ch. Ct. 91

2, ——————, section 145—*Order by Magistrate under the section—Chief Court setting it aside—Effect of Chief Court's order—Restoration of immoveable property—Mode of help—Disobedience of Magistrate's order—Indian Penal Code, section* 188.] A Magistrate ordered under section 145, Criminal Procedure Code, that petitioner should remain in possession of certain lands. This order was set aside in revision by the Chief Court and afterwards the counter-petitioner applied to the Magistrate for restoration of possession. The Magistrate rejected the petition saying that the effect of the order of the Chief Court was to leave the case in *statu quo* and that there was no provision to order the re-delivery of property and the District Magistrate also concurred in this opinion. The petitioner preferred a Revision Petition to the Chief Court:—*Held, per* Justice RANGASWAMI IYENGAR—that there was no provision for delivery of immoveable property to any individual in the Criminal Procedure Code, except that in section 522, which applied only to cases where dispossession had taken place in consequence of an offence accompanied by criminal force. *Also*, that as disobedience of an order passed by a Magistrate under section 145, Criminal Procedure Code, would be punishable under section 188, Indian Penal Code, it was a question for the Magistrate to decide whether the continuance of the said petitioner in possession of the property in opposition to the order of this Court did not amount to an offence under section 188, Indian Penal Code. *Goluck Chandra Pal* v. *Kali Charan De, I.L.R.*, 13 *Calcutta*, 175, followed. *Tarni Charan Chowdhry* v. *Amulya Ratan Roy, I.L.R.*, 20 *Calcutta*, 867, referred to. *Held*, per Justice NANJUNDAYYA—that as section 145 required the Magistrate only to decide which of the parties was in actual possession, there could not logically be any provision in the Code to enforce such order except by prohibiting any interference with such possessisn. The disobedience of the Magistrate's order forbidding all disturbance of possession would be punishable and that seemed to be all that was necessary.

*Lingaiya* v. *Lingaiya* ... ... ... ... 9. Mys. Ch. Ct. 105

3. ——————, sections 145 and 146—*Dispute regarding land—Order of attachment under section 146—Magistrate's powers under these sections.*] One Kale Gowda who was the pattadar of some land, died leaving a minor widow. The latter's father obtained a certificate of guardianship and took possession of all the deceased man's properties on her behalf and attempted to cultivate the land in dispute which was lying waste for several years and which belonged to the deceased man. A man named Nanje Gowda

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alleging that he was an undivided cousin of the deceased Kale Gowda claimed possession of the said land and applied to the Magistrate for an order under section 145 of the Criminal Procedure Code. The Magistrate being of opinion that none of the parties was in possession, passed an order of attachment under section 146, Criminal Procedure Code. Against this order the guardian of Kale Gowda's widow preferred a Revision Petition to the Chief Court:—*Held*, that upon the receipt of the report, the Magistrate acted properly in passing an order under section 145, calling upon the parties to put in statements of their respective claims; *Also*, that there was nothing to prevent the Magistrate who found that neither party was in possession from getting the land cultivated, in the meantime, by either party or by a stranger upon the execution of a muchilika to him.

*Sambu Gowda* v. *Nanje Gowda* ... ... ... 9, Mys. Ch. Ct. 108

4. ——————————, sections 161, 164, and 364—*Statements made before the Police—Recorded in narrative form—Admissibility—False evidence—Indian Penal Code, section 193.*] The accused was charged with having given false evidence either before a Police Officer under section 161 of the Code of Criminal Procedure or before a Magistrate. He was acquitted because the Magistrate was of opinion that the statement which the accused had made before the police was inadmissible in evidence as it was in a narrative form and did not show what questions were put to him. The Chief Court, in the exercise of its Revisional powers:—*Held*, that the decision of the Chief Court in Criminal Appeal No. 88 of 1899-1900 to the effect that "if the entire statement is made in answer to a single question put to a person by a Police Officer under section 161, it is sufficient to render such a person liable for a falsehood contained in such statement," should be followed.

*In re. Venkatasawmi* .. ... .. 9, Mys. Ch. Ct. 88

5. ——————————, section 180, Illustration (b)—*Indian Penal Code, sections 411 and 414—Foreign Territory—Theft and dishonest retention of stolen property therein—Mysore Courts—Jurisdiction.*] The accused was charged before the Magistrate of Kolar Gold Fields for the offences of theft, dishonest possession of stolen property and assisting in the disposal of stolen property committed in places beyond Mysore Territory. The Magistrate convicted the accused of offences under sections 411 and 414, Indian Penal Code and sentenced him to rigorous imprisonment for 6 months. In support of the conviction in appeal, it was contended that the trial was good as the case came within the meaning of Illustration (b) to section 180 of the Criminal Procedure Code:—*Held*, that as the local limits within which the cattle were dishonestly retained or disposed of, were not situated within Mysore Territory though outside the

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Magistrate's jurisdiction, the Illustration (b) of section 180, Criminal Procedure Code, was not applicable and therefore the convictions ot the accused under sections 411 and 414, Indian Penal Code, were set aside. *Reg.* v. *Adivigadu*, *I. L. R.*, 1 *Madras*, 171, followed; *The Empress* v. *Sunker Gope*, *I. L. R.*, 6 *Calcutta*, 307, distinguished.

*Nallathambi* v. *Government* ... ... 9, Mys., Ch. Ct. 79

6. ——————, section 195—*Sanction to prosecute—Order granting it—Appeal—Court entertaining it.*] Orders giving or refusing sanction to prosecute under section 195, Criminal Procedure Code, are appealable and as appeals from the Court of 1st Class Magistrate of Hassan lie to the Court of the Sessions Judge at Mysore, the Petitioners must apply to that Court.

*Nanja Chari* v. *Government* ... ... 9, Mys. Ch. Ct. 99

7. ——————, sections 236 and 237—*Indian Penal Code, sections* 379 *and* 411—*Separate charges—Conviction under one—Alteration of conviction in appeal—Conviction on one only of two charges does not amount to acquittal upon the other charge.*] The Petitioner was charged by the Police for cutting and removing and also for being in unlawful possession of teak wood from District Forests, offences punishable under sections 379 and 411, I. P. C. The Magistrate upon evidence framed separate charges under sections 379 and 411 but convicted the Petitioner only under section 379. On appeal to the Sessions Judge, the conviction was altered to section 411 and the sentence of imprisonment was reduced. The Petitioner in applying for revision of the Judgment of the Sessions Judge, contended that the conviction by the Magistrate only under section 379 although there was a separate charge under section 411, amounted to an acquittal under the latter section, therefore the interference of the Sessions Judge was illegal as it practically interfered with an acquittal. On Revision it was:—*Held*, that the contention was unsound as section 236 of the Code of the Criminal Procedure authorized the Magistrate to frame charges in the alternative and that conviction under one section did not amount to an acquittal under the other.

*In re. Rama Setty* ... ... ... 9, Mys., Ch. Ct. 97

8. ——————, section 488—*Maintenance—Sufficient means.*] *Held*, that the point whether the petitioner had sufficient means as laid down in section 488 to give separate maintenance, did not receive adequate consideration in the hands of the Magistrate, and therefore his present order directing the petitioner to pay Rs. 24 per annum to the counter-petitioner was set aside.

*Eriah* v. *Eramma* .. .. .. 9, Mys. Ch. Ct. 107

9. ——————, section 517—*Order for disposal of property when there is no reason to believe that there has been an offence committed with regard to it—Magistrate's power to act as an arbitrator*

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*or order Police to take charge of property as to which the parties appear to have, a civil dispute.*] Unless there is reason to believe that any offence has been committed with reference to property produced before him, a Magistrate has no authority, under section 517, Criminal Procedure Code, to pass any order with reference to any property. A Magistrate has no right to act as an arbitrator between parties or to order the police to take charge of property regarding which the parties appear to have a civil dispute.

*In re D. Ranoji*... ... .. .. 9, Mys. Ch. Ct. 86

10. ———————, section 537—*Indian Evidence Act, section 33.—Criminal Proceedings—Irregularity—Evidence in one case admitted wholesale in another—Consent of parties—Admissibility.*] A Magistrate admitted the evidence in one case wholesale in another, without the testimony of any witness whatever being recorded in the latter, with the consent of both parties:—*Held*, that the procedure of the Magistrate was irregular and that mere consent of parties could not legalize an important departure from rules of procedure which was Public Law. *Queen Empress* v. *Nund Ram, I. L. R.*, 9 *Allahabad* 609, referred to.

*In re Ranga* ... ... ... ... 9, Mys. Ch. Ct. 95

EXECUTION OF DECREE—*Attachment of moveable property—Bullocks—amin entrusting them to a persom for safe custody—Feeding charges incurred by custodian—Separate suit not necessary—How such charges are recoverable.*] A person to whom the Amin had entrusted some bullocks which were seized by him in execution of a decree, applied to the Court executing the decree for payment of feeding charges incurred by him while the bullocks remained in his custody. The Munsiff rejected the petition and directed the petitioner to sue for the money. The petitioner (custodian) presented this Revision Petition to the Chief Court:—*Held*, that, following the ruling of this Court in Civil Revision Petition No. 5 of 1900-01, which was to the effect that "it is incumbent on the Court to see that the proper payment is made and that the matter should be enquired into without requiring a separate suit to be brought for the purpose," the order of the Munsiff was set aside.

*Hanumantha Rao* v. *Pantangee Ramaiya* ... 9, Mys. Ch. Ct. 72

FALSE CHARGE—*see* INDIAN PENAL CODE, sections 182 and 211.

HEIRSHIP CERTIFICATE—*Promissory note in favour of a Hindu father—Suit by undivided sons—Plaint allegation that it was joint family property—Order directing production based on language of document merely—Unsustainable.*] In a suit brought by sons on a promissory note executed by defendant in favour of their father, the Munsiff held that a certificate of heirship was necessary as there was nothing in the document to show that the sons had equal rights to the

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money which their father had lent to the defendants. On Revision, it was:—*Held*, that the plaintiffs were not bound to take out a certificate of heirship if the promissory note in suit belonged to the joint family property of the plaintiffs and their deceased father as alleged in the plaint and that, this being a question of fact which must be enquired into and determined by the Munsiff before he could insist upon its production, his present order was set aside.

*Sivaramappa* v. *Nadiga Thimappa* ... 9, Mys. Ch. Ct. 76

HINDU LAW—*Joint family—Purchaser of an undivided member's share in family property—Court sale—Rights of such purchaser—Partial partition of family property, suit for—Maintainability—Form of suit and decree in such a case.*] The plaintiff purchased the share of a member of an undivided Hindu family in a house at a sale held in execution of a decree against him. He subsequently brought a suit for partition and delivery of possession of one-half of the house purchased by him after determining the judgment-debtor's share in the properties mentioned in the plaint schedule. It was contended by the defendants that the plaintiff's suit was not maintainable as it did not include all the properties which the family possessed:—*Held*, that the alienability of an interest in the joint family property had long been taken for granted in the State, and that it was too late now to question its propriety and therefore that the contention that the suit was not maintainable had not been made out. *Held further*, that it was unnecessary to apply to an auction-purchaser of family property the prohibition against seeking partial partition, as he was neither interested nor quite in a favourable position to discover all the items of family property in cases in which the real co-parceners were either indifferent about affecting or unwilling to effect a final partition among themselves.

*Lemaji Mylarappa* v. *N. Siddoji Rao* ... 9, Mys. Ch. Ct. 43

HYPOTHECATION—*Property in possession of mortgagor—Damage done to it by third parties—Right of mortgagee to sue them.*] The plaintiff sued for recovery of money due on a hypothecation bond and two persons who had caused damage to the hypothecated property were also made parties to the suit. It was contended on behalf of the latter that they were wrongly joined as defendants and that they were not liable to make good the damage caused by them:—*Held*, *Per* Justice RANGASWAMI IYENGAR:—That even a simple mortgagee would have the right to claim that value of damages caused to the mortgaged property should be security for the satisfaction of his debt when the property was insufficient to meet the same. *Per* Justice NANJUNDAYYA:—That the interest of a simple mortgagee in the mortgaged property was as real and certain as that of a reversioner and therefore there was no reason whatever why the wrong to him in such a case as the present should go without a remedy.

*Ramiah* v. *Basaviah* ... ... ... 9, Mys. Ch. Ct. 18

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——— BOND—*Hypothecatee borrowing money by pledging it—Right of pawnee or his assignee to proceed against hypothecated propety.*] Defendants Nos. 3 and 4 borrowed Rs. 6,000 from defendant No. 1 on the security of some immoveable property. The latter in his turn borrowed a similar sum from defendant No. 2 and pledged the hypothecation bond executed in his favour by defendants Nos. 3 and 4 and also another bond executed by defendants Nos. 5 to 7. The defendant No. 2 assigned the first bond over to plaintiff who sued for the recovery of the money from defendant No. 1 and from the sale of the hypothecated property. The Sub Judge granted a decree as prayed for by plaintiff. In appeal, it was contended that the decree as regards the hypothecated property was not valid:—*Held*, that as defendant No. 2 was simply a creditor of defendant No. 1 and got possession of the bond as a security for the repayment of the loan, his assignee (the plaintiff) was entitled to realize his debt by selling the securities but had no direct claim against the debtors of defendant No. 1.

*Sree Lakshmi Narayanaswami Company Ltd.*, v. *Chika Devaraj Urs.* ... 9, Mys. Ch. Ct. 36

——— OF SEVERAL PROPERTIES—*Decree against some—Execution—Objection by Judgment-debtor before executing Court—Untenable.*] In a suit on a hypothecation bond, the plaintiff omitted to claim relief against a house which was also included in the bond and a decree was passed as prayed for. In execution of the decree, one of the judgment-debtors contended that the decree-holder should first proceed against the house referred to in the suit bond though it was not included in the plaint schedule. The Munsiff declined to go behind the decree and disallowed the objection. The Judgment-debtor preferred this Miscellaneous Appeal :—*Held*, that the Order of the Munsiff was correct. *Ram Dhun Dhur* v. *Mohesh Chunder Chowdhry, I. L. R.*, 9 *Calcutta* 406; and *Moro Raghunath* v. *Balaji Trimbak, I. L. R.*, 13 *Bombay* 45, *distinguished.*

*Siddabasappa* v. *Erra Guntappa* ... ... 9, Mys. Ch. Ct. 52

INDIAN EVIDENCE ACT, sections 32 *cl.* (2) and 34—*Account books—Corroborative evidence necessary to render defendant liable upon entries in plaintiff's books—Relevancy of such entries under section 32, I. E. Act—Legal evidence.*] The contention that entries in plaintiff's accounts are not by themselves sufficient to prove the items is sound and borne out by the case quoted at 18 Allahabad, 92. The entries in the accounts are relevant not only under section 34, Indian Evidence Act, as entries in books of account regularly kept in the course of business but they may also be relevant under section 32, clause (2) as statements made by persons whose attendance could not be secured for examination as witnesses without unreasonable delay and expense.In this view they serve as evidence capable of establishing the fact which they recorded.

*Thimmaiya* v. *M. Kasim Aboo Baker Sait.* 9, Mys. Ch. Ct. 62

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INDIAN LIMITATION ACT, sections 19 and 20—*Suit on a bond—Payment of interest—Endorsement without actual payment—Acknowledgment within the meaning of section* 19.] A suit for the recovery of money due on a bond brought within three years from the date of an endorsement thereon to the effect that a few rupees were paid towards interest was dismissed by the Munsiff on the ground that actual payment was made one year after the endorsement when the time for the recovery of the debt had become barred. The plaintiff preferred this Revision Petition:—*Held*, that there was no warrant for narrowing the scope of section 20 of the Indian Limitation Act by interpreting it to apply only to actual payment of interest in cash or kind and therefore the decision of the Munsiff on the question of limitation was set aside.

*Rangaswamaiya* v. *Ramalinga Sastry* ... 9, Mys. Ch. Ct. 70

2. ——————, ARTICLES 173A and 177A—*Audjustment of decree out of Court—Enquiry into the truth thereof—Judgment debtor's application therefor within one year from the date of adjustment—Article applicable to such a case.*] The Judgment-debtor's application to equire into the truth of the adjustment, was made within one year from the date of such adjustment and consequently was not barred under Article 177A of the Limitation Act. Article 173A of the Regulation does not apply, because the time begins to run under that clause from the date of service of a notice in execution upon the applicant. and, in this case such a notice does not appear to have been served on him.

*Venkata Subba Setty* v. *Venkata Setty* .. 9. Mys. Ch. Ct. 48

3. ——— ——————, SCHEDULE II, ARTS. 132 AND 147—*Hypothecation as distinguished from mortgage—Limitation.*] In a suit on a hypothecation bond brought by plaintiff alleging some subsequent payments by defendant towards interest, the latter denied those payments and pleaded that the suit had become barred by time:—*Held*, that Article 147 applied to a transaction in which it was open to one party to sue for redemption and for the other party to sue for foreclosure or sale, that a hypothecation did not admit of such reciprocal rights and that suits upon hypothecation bonds for money were governed by Article 132. *Also*, that the Chief Court had invariably been of opinion, like the High Courts of Madras and Calcutta, that a hypothecation created only a charge upon immoveable property and that it was different from a mortgage.

*Madaiya* v. *Anke Gowda* ... ... 9, Mys. Ch. Ct. 11

INDIAN PENAL CODE, section 64—*Criminal Procedure Code, section* 33—*Fine—Imprisonment in default of payment thereof—Whether a Court is bound to pass such a sentence.*] Section 64, Indian Penal Code,

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read with section 33, Criminal Procedure Code, does not appear to require that a sentence of imprisonment should be passed in default of payment of fine.

*In re. Bharmanna* ... ... ... 9, Mys. Ch. Ct. 91

2. ———————, sections 182 and 211—*False charge—False charge made to Police—Sanction to prosecute therefor—Unnecessary.*] The accused were charged before the 1st Class Magistrate of Tumker with offences under sections 182 and 211, Indian Penal Code. The Magistrate convicted and sentenced the accused under section 182, Indian Penal Code, remarking that he considered it unsafe to frame a charge under section 211, in the absence of the Magistrate's sanction:—*Held*, that as the false charge, in this case was not committed in or in relation to any proceeding in any Court, no previous sanction was necessary to prosecute the accused therefor.—*Ramasami* v. *The Queen Empress, I. L. R.*, 7 *Madras*, 292; *Karim Buksh* v. *The Queen Empress, I. L. R.*, 17 *Calcutta*, 574; *and Imperatrix* v. *Jijibhai Govind, I. L. R.*, 22 *Bombay*, 596, followed.

*Huchey Gowda* v. *Government* .. ... 9, Mys. Ch. Ct. 81

3. ———————, section 188—*Criminal Procedure Code, section 145—Order by Magistrate under the section—Chief Court setting it aside—Effect of Chief Court's order—Restoration of immoveable property—Mode of help—Disobedience of Magistrate's order.*] A Magistrate ordered under section 145, Criminal Procedure Code, that petitioner should remain in possession of certain lands. This order was set aside in revision by the Chief Court and afterwards the counter-petitioner applied to the Magistrate for restoration of possession. The Magistrate rejected the petition saying that the effect of the order of the Chief Court was to leave the case in *statu quo* and that there was no provision to order the re-delivery of property and the District Magistrate also concurred in this opinion. The petitioner preferred a Revision Petition to the Chief Court:—*Held*, *per* Justice RANGASWAMI IYENGAR—that there was no provision for delivery of immoveable property to any individual in the Criminal Procedure Code, except that in section 522, which applied only to cases where dispossession had taken place in consequence of an offence accompanied by criminal force. *Also*, that as disobedience of an order passed by a Magistrate under section 145, Criminal Procedure Code, would be punishable under section 188, Indian Penal Code, it was a question for the Magistrate to decide whether the continuance of the said petitioner in possession of the property in opposition to the order of this Court did not amount to an offence under section 188, Indian Penal Code. *Goluck Chandra Pal* v. *Kali Charan De, I. L. R.*, 13 *Calcutta*, 175, followed. *Tarini*

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*Charan Chowdhry* v. *Amulya Ratan Roy*, *I.L.R.*, 20 *Calcutta*, 867, referred to. *Held*, per Justice NANJUNDAYYA—that as section 145 required the Magistrate only to decide which of the parties was in actual possession, there could not logically be any provision in the Code to enforce such order except by prohibiting any interference with such possession. The disobedience of the Magistrate's order forbidding all disturbance of possession would be punishable and that seemed to be all that was necessary.

*Lingaiya* v. *Lingaiya* ... ... ... 9. Mys. Ch. Ct. 105

4. ——————, section 193—*Criminal Procedure Code, sections 161, 164, and 364—Statements made before the Police—Recorded in a narrative form—Admissibility—False evidence.*] The accused was charged with having given false evidence either before a Police Officer under section 161 of the Code of Criminal Procedure or before a Magistrate. He was acquitted, because the Magistrate was of opinion that the statement which the accused had made before the police was inadmissible in evidence as it was in a narrative form and did not show what questions were put to him. The Chief Court, in the exercise of its Revisional powers :—*Held*, that the decision of the Chief Court in Criminal Appeal No. 88 of 1899-1900 to the effect that "if the entire statement is made in answer to a single question put to a person by a Police Officer under section 161, it is sufficient to render such a person liable for a falsehood contained in such statement," should be followed.

*In re. Venkatasawmi* ... ... ... 9, Mys. Ch. Ct. 83

5. ——————, section 283—*Leaving a bullock cart unattended in a public road—Calf run over and killed—Whether an injury to the owner of the calf under the section.*] The accused was charged with having left his cart with bullocks yoked to it unattended in a public road with the result that the bullocks started and the wheels ran over a calf and killed it. He pleaded guilty and the Magistrate convicted him of an offence under section 283, Indian Penal Code, and passed a sentence of fine only. The District Magistrate being of opinion that the section was applicable only to acts causing damage or injury to persons using the road, referred the case to the Chief Court for orders under section 438, Criminal Procedure Code :—*Held*, that there was nothing in section 283, I. P. C., which showed that any harm illegally done to a man's property was intended to be excluded from its operation.

*In re. Mahomed Sab* ... ... ... 9, Mys. Ch. Ct. 92

6. ——————, section 353—*Assaulting a public servant—Arrears of Revenue—Amildar's order to attach moveables therefor—Sheikdar executing such order—Assault on him, whether an offence under the section.*] The accused was charged with assaulting a Sheikdar when

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he was executing an order of the Amildar for attaching the moveables belonging to the accused for arrears of Revenue due by him to Government. The Magistrate was of opinion that the Amildar was wrong in ordering attachment of moveables and that the Sheikdar was not engaged in the lawful discharge of his duty and therefore acquitted the accused:—*Held*, on a perusal of the records, that although the Amildar wrongly exercised his discretion in ordering the attachment of moveables, yet his order was legal and therefore the Sheikdar who was legally bound to carry it out, was assaulted in the execution of his duty as a public servant.

*In re. Santhe Gowda* ... ... ... 9. Mys. Ch. Ct. 90

7. ——————, sections 411 and 414—*Foreign Territory—Theft and dishonest retention of stolen property therein—Mysore Courts—Jurisdiction—Criminal Procedure Code, section* 180, *Illustration* (*b*).] The accused was charged before the Magistrate of Kolar Gold Fields for the offences of theft, dishonest possession of stolen property and assisting in the disposal of stolen property committed in places beyond Mysore Territory. The Magistrate convicted the accused of offences under sections 411 and 414, Indian Penal Code and sentenced him to rigorous imprisonment for 6 months. In support of the conviction in appeal, it was contended that the trial was good as the case came within the meaning of Illustration (b) to section 180 of the Criminal Procedure Code:—*Held*, that as the local limits within which the cattle were dishonestly retained or disposed of, were not situated within Mysore Territory though outside the Magistrate's jurisdiction, the Illustration (b) of section 180, Criminal Procedure Code, was not applicable and therefore the convictions of the accused under sections 411 and 414, Indian Penal Code, were set aside. *Reg* v. *Adivigadu, I. L. R.*, 1 *Madras*, 171, followed; *The Empress* v. *Sunker Gope, I. L. R.*, 6 *Calcutta*, 307, distinguished.

*Nallathambi* v. *Government* ... ... 9, Mys. Ch. Ct. 79

JODI VILLAGE—*Shanboguee Inam—Questions regarding such Inams—Civil Courts—Jurisdiction to entertain suits involving those questions—Land Revenue Code, section* 221, *clause* (*a*)—*Government Notification, dated 9th September* 1835.] In a suit by a Jodidar for the recovery of possession and produce of a land which the defendant (Shanbouge) alleged to be his Service Inam, it was contended by the latter that Civil Courts had no jurisdiction to entertain such suits:—*Held*, that section 221, clause (a) of the Land Revenue Code, and Notification of Government dated 9th September 1835, equally applied to village service in Government as well as alienated villages and therefore the opinion of the Sub-Judge that the suit was not cognizable by a Civil Court was in accordance with the Revenue Law in force in Mysore.

*Sambasastry* v. *Malappa* ... ... 9, Mys., Ch. Ct. 1

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JOINT HINDU FAMILY—*See* SUCCESSION CERTIFICATE REGULATION.

JURISDICTION—*See* CRIMINAL PROCEDURE CODE, SECTION 180, ILLUSTRATION (*b*).

LAND ACQUISITION REGULATION, sections 23, clause (1), and 24—*Market value of land at the time of Notification—Mode of calculating market value and amount of compensation.*] One Balekayee Seshappa who was the holder of Survey No. 37 in the Guttahalli Village of the Bangalore Taluk, mortgaged it to one Mr. Sreenivasa Iyengar in 1857 for Rs. 756. When the Western Extension of the Bangalore City was planned, the mortgagee transferred his title and interest to the Municipality and received the full amount of the mortgage money. The 1st, 2nd and 3rd defendants stated to be the grandsons and the 4th defendant the daughter-in-law of Seshappa claimed compensation. An offer of Rs. 100 per acre was made to them in settlement of their claim in consideration of the delay caused to them, although the adjoining lands were acquired at rates varying from Rs. 70 to 102½ an acre. As this was not accepted, the Deputy Commissioner of Bangalore referred the matter to the Sub Judge under section 18 of the Land Acquisition Regulation. The Sub Judge decreed that compensation should be paid at the rate of Rs. 150 per acre with interest at 6 per cent. per annum from the date of original acquisition in 1889. In appeal against the decree, the defendants contended that the amount of compensation awarded was very inadequte and that the mode of calculating the same was incorrect: —*Held*, that, according to the strict provisions of the Regulation, the ma·ket value at the time of publication of the Notification must be adopted. *Held further*, that though, as a matter of fact, the Municipality in this case had added the land into the Western Extension and converted it into road and building sites, yet for purposes of calculation of the compensation, the land should be looked upon as mere dry land assessed to land revenue and subject to all incidents applicable to such land under the Land Revenue Regulation:—*Held also*, that the contention of the appellants that they should be paid all the money realized by the Municipality by the sale of sites irrespective of the lands set apart for the roads or of the costs incurred in making the approach roads and parcelling them out into sites &c., could not therefore be accepted.
*B. Govinda Row* v. *The Deputy Commissioner, Bangalore District* ... 9, Mys. Ch. Ct. 28

LAND REVENUE CODE, sections 96 and 97—*Survey settlement—Introduction into a Jodi village at the instance of a Jodidar—Enhancement of Revenue—Complaint to the Deputy Commissioner—Order refusing the relief prayed for—No appeal lies to the Chief Court.*] On the application of the Jodidar of Hommadevanahalli, Bangalore Taluk, Survey settlement was introduced into the village and the Jodi was raised.

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A tenant under the Jodidar complained to the Assistant Commissioner against the enhancement of Revenue, also alleging that there were several irregularities connected with the settlement. That Officer referred the petitioner to a regular suit. Thereupon, the tenant presented an appeal to the Deputy Commissioner who disposed of it under section 97 of the Land Revenue Code. Against this order, the tenant preferred this Miscellaneous Appeal to the Chief Court under section 96 of the Land Revenue Code :—*Held*, that in the present case no appeal lay to the Chief Court as the order did not come under section 97 of the Land Revenue Code and that if the appellant was aggrieved by the order, the remedy was apparently to petition the Government or to apply to the Deputy Commissioner for reconsideration or to file a formal suit under the provisions of section 88 or other sections in chapter VII.

*Mahaboob Oonnisa Begam* v. *Seenappa* ... 9, Mys. Ch. Ct. 59

2. ——————, section 221, clause (*a*)—*Government Notification, dated 9th September* 1835—*Jodi Village—Shanboguee Inam—Questions regarding such Inams—Civil Courts—Jurisdiction to entertain suits involving those questions.*] In a suit by a Jodidar for the recovery of possession and produce of a land which the defendant (Shanbouge) alleged to be his Service Inam, it was contended by the latter that Civil Courts had no jurisdiction to entertain such suits :—*Held*, that section 221, clause (a) of the Land Revenue Code, and Notification of Government dated 9th September 1835, equally applied to village service in Government as well as alienated villages and therefore the opinion of the Sub-Judge that the suit was not cognizable by a Civil Court was in accordance with the Revenue Law in force in Mysore.

*Sambasastry* v. *Mallappa* ... ... 9, Mys., Ch. Ct. 1

LIMITATION—*Land Revenue Code—Applicability to suits by private individuals—Contribution Suit—Co-owner of a jodi village suing another after division—Tank—Cost of repairs thereto—Payment thereof by the former to Government—When cause of action arises.*] A co-owner of a jodi village sued another in 1902 for contribution of a portion of Rs. 548-6-7, which the former had paid to Government in 1895 for the cost of some repairs which the Government had executed to a tank in the village while it remained under their management, alleging that the cause of action arose in September 1901 when the defendant obtained a decree against plaintiff for his one-sixth of the said village. It was contended that the suit was barred by time :—*Held*, that the provisions of the Land Revenue Code which empowered Government to recover certain charges in the same manner in which arrears of Land Revenue might be recovered, did not apply to a claim made by a private individual and that the cause of action, if any, arose in June 1895 when the

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cost of repairs was paid by plaintiff to Government and therefore the suit was barred.

*Sreedhara Rao* v. *Sreenivasa Rao* ... ... 9, Mys. Ch. Ct. 85

———— ACT, SCHEDULE II, ARTICLE 179, CLAUSE (2)—*Suit against several—Appeal against one—Execution of decree—Limitation—Starting point.*] The plaintiff brought a suit for recovery of money due on a hypothecation bond against the executant, his sons and a widow who claimed maintenance from the hypothecated property. It was decreed against the executants and his sons and against the hypothecated property excepting a house over which the widow was declared to have a prior charge on account of her maintenance. The plaintiff appealed from the decree in so far as it upheld the widow's claim but did not make the other defendants parties to the appeal. The Appellate Court modified the decree of the Court of First Instance. The plaintiff applied for the execution of the decree against all the defendants within 3 years from the date of the appellate decree but after 3 years from the date of the decree of first Court and it was contended that the execution had become time-barred so far as regards the executants and his sons as they were no parties to the appeal. The Lower Court dismissed the petition. The plaintiff (decree-holder) preferred this Miscellaneous Appeal against the aforesaid order of dismissal:—*Held*, that following the Full Bench decisions of the High Courts of Madras and Calcutta, the period of limitation would run from the date of the Appellate decree and therefore the application was not barred. *Gopal* v. *Gosaindas*, *I. L. R.*, 25 *Cal.* 594; and *Kristnamma Chariar* v. *Mangammal*, *I. L. R.*, 26 *Mad.* 91, followed.

*Naranappa* v. *Davangere Vasappa* ... 9, Mys. Ch. Ct. 54

MAINTENANCE—*Misjoinder of parties and causes of action—Ground of action common to all plaintiffs—Concubine—Illegitimate children—Suit by all of them jointly against the heirs of a deceased Hindu.*] The concubine of a deceased Hindu and her children jointly sued the deceased's heirs for maintenance. It was contended by the latter that each plaintiff had a separate cause of action and that each should file a separate suit:—*Held*, that there was no valid objection to the institution of a single suit since the ground of action was common to all the plaintiffs, *viz.*, that they have a right to charge the deceased man's property in the hands of his successors with their maintenance.

*Nagamma* v. *Bheema Rao* ... ... 9, Mys. Ch. Ct. 61

MINORS' RULES OF 1872—*Suit by guardian—Order of appointment not properly stamped—Dismissal of suit on that ground—Appeal—Court Fees Regulation III of* 1900, *schedule I, Art.* 9.] A suit brought by a guardian on behalf of a minor was dismissed on the ground that the plaintiff had not obtained a properly stamped certificate. On

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appeal, it was :—*Held*, that the Minors' Rules did not make it imperative that the order of public commission or any document should be produced in evidence before the manager could be admitted to sue, and all that the Court could require was proof of appointment which could be furnished by the copy of the order filed in this case and therefore the Munsiff's decision was liable to be reversed.

*Ananda Thirtha Rao* v. *Venkatappa* ... 9, Mys. Ch. Ct. 40

MUKHTAR—*Right to appear for complainant—Magistrate refusing permission—Illegal—Chief Court Proceedings, dated 9th December* 1897.] The petitioner was practising as a Mukhtar in some Criminal Courts of the Mysore District. In a certain case the Amildar Magistrate of Yellandur refused to permit the petitioner to appear for the complainant and rejected the Vakalatnama filed by him on the ground that the concession of allowing any person to appear for the accused could not be extended to the petitioner as he wanted to appear for the complainant. Against this order the petitioner preferred a Revision Petition to the Chief Court:—*Held*, that the opinion of the Magistrate that he had no power to permit any person other than an authorized person to act for the prosecution was erroneous.

*In re. V. Sreenivasa Iyengar* ... ... 9, Mys. Ch. Ct. 102

MYSORE ARMS REGULATION VI OF 1890, section 14, clause (d)—*Possession of a gun without a license.*] The accused who was carrying a gun which his father had left on a threshing floor, was charged with having a gun without a license and thereby having committed an offence under section 14, clause (d) of the Arms Regulation VI of 1890. The Magistrate convicted and sentenced him to a fine of Rs. 15. The Chief Court in exercise of its Revisional powers:—*Held* that the Legislature did not appear to have contemplated that each member of a household must take out a license for one and the same gun and therefore the conviction of the accused for being in possession of his father's gun without a separate license was set aside.

*In re. Kada* ... ... ... ... 9, Mys. Ch. Ct. 93

MYSORE EXCISE REGULATION V of 1901, sections 12 and 55, proviso—*Drawing toddy from date trees—Enhanced punishment—Liability.*] As the offence of manufacture of liquor is stated separately in the body of the section from that of tapping a toddy producing tree or drawing toddy, it must be presumed that the Legislature did not intend to make the *proviso* applicable to the specific offences of drawing toddy or tapping a toddy producing tree. The opinion of the Taluk Magistrate that the *proviso* applies only to manufactures of intoxicating drugs appears to be correct.

*In re. Dodde Gowda* .. .. ... 9, Mys. Ch. Ct. 85

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2. ——————————, section 56, clause (*b*)—*Akkibhoja—Sale in an appointed place on a non-shandy day—Legality.*] *Held*, that the mere fact that Akkibhoja was sold on a day on which there was no shandy was insufficient to support the conviction, if the sale was made in an appointed place, and that as the sale appeared to have been made in the shop described in the license, the conviction was set aside.

*In re. Guttiyappa* .. ... .. 9, Mys. Ch. Ct. 83

MYSORE MINES REGULATION, section 8—*Unlawful possession—Mining material—Presumption.*] The petitioner having been found in possession of 30 pink stearine candles with the Mysore Company's wick and 6 candle ends with the Oorigam Company's wick, without legal permit, the Special Magistrate, Kolar Gold Fields, convicted him under section 8 of the Mining Regulation for being in unlawful possession of mining material. On Revision it was :—*Held*, that, the exclusive possession was not proved by the prosecution witnesses, and therefore, the conviction was quashed.

*Abdul Rahim v. Government* ... ... 9, Mys. Ch. Ct. 100

MYSORE REGISTRATION REGULATION, sections 76 and 77—*Suit to compel registration of document—Refusal to register it—Order passed by an Officer in charge of the Registrar's duties—Civil Court's power to question the legality thereof—Agreement to divide hereafter—Optionally registrable—Maintainability of suit.*] The plaintiff brought a suit under section 77 of the Mysore Registration Regulation to compel the registration of a document which was found to be merely an agreement to divide hereafter and as such optionally registrable. The Munsiff held that the order of refusal to register, having been passed by an Officer who was only in charge of the current duties of the Deputy Commissioner, was *ultra vires*, and this opinion was confirmed by the District Judge in appeal. In Second Appeal, it was :—*Held*, that it was not open to a Civil Court to question the legality of an order passed by an Officer as Deputy Commissioner and District Registrar. *Also*, that when the registration of a document was optional and not indispensable for its operation, if otherwise enforcible, it did not seem proper to contend that 1st defendant was bound to comply with a wish of the plaintiff to impart additional force or validity to the document.

*Rahiman Bee v. Syed Mohadeen Sabi* ... 9. Mys. Ch. Ct. 4

PROMISSORY NOTE—*Indorsee suing maker and indorser—Nature of contract between indorser and indorsee—Indorser when exempted from liability.*] The plaintiff who was the indorsee of a promissory note, sued the indorser and the maker's legal representative for the recovery of money due thereon. It was contended on behalf of the indorser (Bank) that the plaintiff had willingly received the promissory note n full satisfaction of the debt due to him from the Bank and that

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its liability had thereby ceased:—*Held*, that the indorsee intended to recover his debt from the maker only and not from the indorser (Bank) and therefore the decision of the District Judge making it also liable should be set aside.

*Lakshmi Narayanaswami Bank* v. *Madappa* ... 9, Mys. Ch. Ct. 8

PROMISSORY NOTES EXECUTED BY MOTHER—*See* CIVIL PROCEDURE CODE, SECTION 456.

PUROHIT AND JOYISA—*Suit for declaration of right to officiate and for damages for loss of fees.*] The plaintiff sued for establishing his right to the Pourohitya and Jyotishya in the town of Yellandur and for recovery of damages from the 1st defendant who had wrongfully received the emoluments on a festive occasion:—*Held*, that a claim of such a general and indefinite nature required very strong evidence of title to sustain it and that the fact that the plaintiff had been acting as Purohit in the place for whatever length of time was not sufficient to entitle him to a decree that no others might perform similar duties within the area claimed by him.

*Sreecanta Sastry* v. *Pandu Ranga Upadhya* ... 9, Mys. Ch. Ct. 7

REGULATION:

*See* COURT FEES REGULATION.

*See* LAND ACQUISITION REGULATION.

*See* MYSORE ARMS REGULATION.

*See* MYSORE EXCISE REGULATION.

*See* MYSORE MINES REGULATION.

*See* MYSORE REGISTRATION REGULATION.

*See* SUCCESSION CERTIFICATE REGULATION.

REVENUE OFFICER.—*Stamp Vendor—Embezzlement in stamps—Land belonging to him sold under an order of the Deputy Commissioner—Dispossession by purchaser—Suit for possession and mesne profits against purchaser.*] Plaintiff was a salaried stamp vendor at Shimoga, working under the orders of the Treasury Officers for the time being, the father of the defendant having been one of them. The plaintiff falsified his indents and accounts and thereby induced the Treasury Officer to entrust him from time to time with stamps of large value. Having by such deception, obtained the stamps, he misappropriated the sale proceeds to the extent of Rs. 3,732-5-0. On the embezzlement being discovered, the plaintiff was prosecuted and convicted and the Revenue Department sold his landed property to recover the amount misappropriated. In the course of that sale, the defendant's father purchased the land in suit for

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Rs. 1,200 on the 11th June 1894 and was put in possession on the 20th idem. The plaintiff brought a suit for the recovery of the aforesaid land, alleging that the defendant's father had wrongfully dispossessed him of the land in a so-called sale which was illegal and contrary to law. Both the Lower Courts were of opinion that the plaintiff was entitled to succeed. In Second Appeal, it was contended by the defendant that the Deputy Commissioner was competent to sell the property under the provisions of section 24, Land Revenue Code, and that the Lower Courts should have made the payment of purchase money by the plaintiff to defendant a condition precedent to the former's recovering the land from the latter:—*Held*, that a careful consideration of the definition of the word "Revenue Officer" and of the provisions of section 24, Land Revenue Code, would show that there was no force in the contention that the stamp vendor could be regarded as a Revenue Officer. *Held further*, that as there was nothing in the circumstance of the case from which it could be presumed that the defendant paid the purchase money at the implied request of the plaintiff or to protect his interests, the defendant was not entitled to insist on re-payment by plaintiff of the sale proceeds in this case.

*K. Hanumantha Rao* v. *Batni Venkoba Rao* ... 9, Mys. Ch. Ct. 13

SECOND APPEAL—*See* COSTS.

STAMP VENDOR—*See* REVENUE OFFICER.

SUB JUDGE—*Small cause decree passed by him—Munsiff subsequently invested with small cause jurisdiction—Applications for execution presented to the latter—Final application to execute presented to Sub Judge after three years from date of decree—Proper Court to continue execution proceedings.*] There is room for difference of opinion on the question whether the decree ought to be executed by the Subordinate Judge or by the Munsiff. Until the question is decided by a Full Bench, the latest ruling by *Mr. Best C. J.* and *Mr. Narahari Rao J*, "that the Munsiff had jurisdiction to execute the decree" may be followed. (Miscellaneous Appeal No. 22 of 1901-02).

*Chikka Muniyappa Setti* v. *Muni Thimma*... 9. Mys. Ch. Ct. 66

SUCCESSION CERTIFICATE REGULATION—Regulation VII of 1901, section 4—*Joint Hindu Family—Decree obtained by a deceased member thereof—Execution applied for by surviving members—No necessity for certificate—Presumption as to nature of debt where family is joint.*] The Petitioners who claim the money as surviving members of a joint Hindu family, do not claim it as the effects of their deceased father and consequently their petition is not governed by the Regulation. The corresponding Act (Act VII of 1889) which is in force in British India, is, according to the opinion of all the High Courts, confined to the case in which the claim is to the "effects," of the de-

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ceased and not to family property where the claim is by right of survivorship. (*See* I. L. R., 20. M. 232; 22 M. 380; 19 B. 338; 17 A. 578 and 23, C. 912). It is not necessary that it should appear on the face of the bond or decree that the debt is due to the joint family and that fact may be established by other evidence.

*Subba Rao* v. *Sheshanna*... ... ... 9, Mys. Ch. Ct. 73

2. ————————————, VII of 1901, section 9—*Court issuing certificate—Collections of debts due to the deceased person—Power to call upon sureties to render an account thereof.*] The holder of a succession certificate applied to the Court under section 9, Regulation VII of 1901, to call upon his sureties to produce the amounts of money which they had collected from the debtor of the deceased person and to invest the same in the Savings Bank. The District Judge, being of opinion that even if the allegation be true, he had no power to order the sureties to pay the amount into Court, dismissed the application. The applicant preferred a Revision Petition to the Chief Court:—*Held*, that section 9 did not clearly apply to the present case and that there was apparently no general rule or law authorizing the Court which issued a certificate of heirship, to call upon the sureties to render an account of the collections which should be made by the person to whom the certificate was granted on their security.

*Honchayya* v. *Lakkanna* ... ... 9, Mys. Ch. Ct. 67

SURETY—*See* CIVIL PROCEDURE CODE, Sections 253, 545 and 546.

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# THE
# MYSORE CHIEF COURT REPORTS.

## APPELLATE CIVIL

## SECOND APPEAL.

*Before Mr. Justice A. Ramachendra Iyer, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

1904. January 18.

SAMBASASTRY, APPELLANT, (PLAINTIFF),

*v.*

MALLAPPA, RESPONDENT, (DEFENDANT).*

*Jodi village—Shanboguee Inam—Questions regarding such Inams—Civil Courts—Jurisdiction to entertain suits involving those questions—Land Revenue Code, section* 221, *clause (a)—Government Notification, dated* 9*th September* 1885.

In a suit by a Jodidar for the recovery of possession and produce of a land which the defendant (Shanbogue) alleged to be his Service Inam, it was contended by the latter that Civil Courts had no jurisdiction to entertain such suits.

*Held*, that section 221, clause (a) of the Land Revenue Code, and Notification of Government dated 9th September 1885, equally applied to village service in Government as well as alienated villages and therefore the opinion of the Sub-Judge that the suit was not cognizable by a Civil Court was in accordance with the Revenue Law in force in Mysore.

SUIT for possession and mesne profits. The Munsiff passed a decree in favour of plaintiff. In appeal, the Sub Judge reversed the decree and dismissed the plaintiff's suit on the ground that the claim involved questions regarding a hereditary office of Government, and therefore was not cognizable by Civil Courts.

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* Second Appeal No. 18 of 1901-02, against the decree of the Sub Judge of Bangalore in A. S. No. 60 of 1900-01, reversing the decree of the Munsiff of Maddagiri in O. S. No. 82 of 1899-00.

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SAMBA SASTRY v. MALLAPPA

The plaintiff preferred this Second Appeal.

Mr. *S. Narasimha Iyengar* for the appellant.

Mr. *N. Cheluva Iyengar* for the respondent.

JUDGMENT—The plaintiff is the Jodidar of a village called Jaganathpura, Kortagiri Sub-Taluk, and the defendant is the Shanbogue of that Jodi village. The former alleged that the latter had taken possession of a land item No. 1 in plaint schedule and had been holding it as his Shanbogue Inam and sued for its recovery with mesne profits for 3 years.

The defendant pleaded that it was his Service Inam and had been in possession of his family since the days of his ancestors. The Munsiff found that this land belonged to the Jodi village as alleged by plaintiff and was not the Shanbogue Manya and decreed the plaintiff's claim.

On appeal the Sub Judge of Bangalore held that the suit was not cognizable by a Civil Court under Notification dated 9th September 1835 and reversed the Munsiff's decree. The plaintiff has preferred this Second Appeal against the Sub Judge's decision.

The first question for determination is accordingly whether the present suit is cognizable by a Civil Court. The Notification cited by the Sub Judge, para 6, provides that "claims to succession to or to the possession of hereditary Village Offices as above are not to be cognizable by any of the Courts of Judicature," (page 62, Mysore Revenue Manual). This provision was again affirmed in General Circular No. 5 of 72-73, dated 22nd October 1872, para 10. Though these rules refer only to succession to or possession of hereditary Village Office, the Sub Judge argues that, as the possession of the Maniam or Mirasi lands are involved in such claims to the office, any dispute, relating to the Mirasi or Service Inam land, must conversely be regarded as connected with a claim, affecting the office, and as such must stand excluded from the jurisdiction of Civil Courts. It may be contended that the Notification in question does not apply to the circumstances of the present suit, inasmuch as the Jodidar does not dispute the right of the defendant to hold the office of Shanbogue, or to enjoy the Maniam land attached to the office, but only questions the identity of the Maniam land. But is not the dispute as to the identity of the Mirasi or Maniam land intimately connected with the right to or emoluments of the office of

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SAMBA SASTRY v. MALLAPPA.

the Shanbogue. For instance, if the Inam land should be decided to be some land other than the right one, the sufferer will be, not the present Shanbogue only but also future incumbents and ultimately the Government. In this Jodi village, the service Inam has been separately settled and confirmed to the office of Shanbogue, and if the present family becomes extinct, or is deprived of the office, the Government will have the power to appoint a successor in the office and to assign to him the maniam, or to dispose of the land otherwise. On the value of the maniam land will depend how far the office will be sought after, so that if either through collusion between the Jodidar and the Shanbogue or through the latter not being able to press his rights properly in a suit contested without notice to or intervention of Government, the maniam holding should lose its natural value, the interests of Government as the ultimate owner of the Maniam and the disposer of the office will suffer. Though this may be an extreme illustration of the case, it is not an incorrect or improbable view to advance as an argument of the principles applicable to the case.

The provisions of section 221, clause (a) parts one and four also would seem to apply to this case. Though they require that the claims should be against Government, yet in a proper view of this case the Government is a necessary party to it. The defence set up by the defendant in this case is, that the land in dispute is his Service Inam, and the question involves the consideration whether the Government originally gave this land in Inam or confirmed it at the Inam Settlement and as the Government has still a subsisting interest in such Inam land independently of the Jodidar, the Shanbogue or the Government would have been competent to claim that the latter should be made a party to the suit. Thus, though the Government have not been impleaded, they are necessarily a party to the dispute so as to bring the case under the purview of section 221.

It remains only to observe that section 221 and the Notifications above referred to apply equally to village service in Government as well as alienated villages. Government Proceedings No. 1345-P., dated 27th May 1884 lays down that a person to whom a village is alienated by Government is bound by the same rules as would bind Government in regard to hereditary village servants and Rule IV, Land Revenue Rules, provides that the nomination of village servants in Inam villages shall vest with the

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Inamdar, subject to confirmation by Deputy Commissioner, and that if the Inamdars fail to make the appointment, the Deputy Commissioner will take steps to make the appointment (pp. 52, 53, Mysore Revenue Manual).

The opinion of the Sub-Judge is, therefore, in accordance with the Revenue Law in force in Mysore, and his decisions must be affirmed. This appeal is accordingly dismissed with costs.

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February 2.

## APPELLATE CIVIL.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

RAHIMAN BEE AND 2 OTHERS, APPELLANTS, (PLAINTIFFS).

v.

SYED MOHADEEN SABI AND 2 OTHERS, RESPONDENTS, (DEFENDANTS).*

*Mysore Registration Regulation, Sections 76 and 77—Suit to compel registration of document—Refusal to register it—Order passed by an Officer in charge of the Registrar's duties—Civil Court's power to question the legality thereof—Agreement to divide hereafter—Optionally registrable—Maintainability of suit.*

The plaintiff brought a suit under Section 77 of the Mysore Registration Regulation to compel the registration of a document which was found to be merely an agreement to divide hereafter and as such optionally registrable. The Munsiff held that the order of refusal to register, having been passed by an Officer who was only in charge of the current duties of the Deputy Commissioner, was *ultra vires* and this opinion was confirmed by the District Judge in appeal. In Second Appeal, it was

*Held*, that it was not open to a Civil Court to question the legality of an order passed by an Officer as Deputy Commissioner and District Registrar;

*Also*, that when the registration of a document was optional and not indispensable for its operation, if otherwise enforcible, it did not seem proper to contend that 1st defendant was bound to comply with a wish of the plaintiff to impart additional force or validity to the document.

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* Second Appeal No. 159 of 1901-02, against the decree of the District Judge of Mysore in Appeal No. 39 of 1900-01, confirming the decree of the Court of the Principal Munsiff of Mysore, in Original Suit No. 546 of 1898-99.

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RAHIMAN BEE v. SYED MOHADEEN SABI.

SUIT to compel registration. The Munsiff dismissed the suit and this decision was confirmed in appeal by the District Judge on other grounds.

The plaintiff preferred this Second Appeal.

Mr. *B. Nanjundappa* for the appellants.

JUDGMENT—One Shaikdar Syed Ahmed Sab, deceased, had three wives. The 1st defendant is his son by the first wife. The plaintiffs are the children of another wife, who is also dead. The 2nd defendant is his 3rd wife, and the 3rd defendant her son.

The plaintiff's mother, 1st defendant, and 2nd defendant entered into an agreement for the division of the property of the deceased Shaikdar among themselves and the 1st defendant on the one part and the two widows on the other part exchanged karars on 12th August 1898. The karar indicated generally that certain property and debts should be taken by the 1st defendant for his share, the two widows getting certain others for their and their children's shares, that the various properties should be inspected and that the articles therein and the timber in stock should be properly inventoried and that all should be partitioned between the parties in the presence of certain friends named in the karar and that regular deeds should then be exchanged.

The plaintiff's mother then died and the plaintiff's guardian instituted this suit for registration of the karar. The Munsiff held that the order passed by Mr. Paramasiva Iyer as District Registrar, refusing registration, was *ultra vires* as he was only in charge of the current duties of the Deputy Commissioner during the permanent incumbent's absence on casual leave and that plaintiff's suit was not properly instituted under sections 76 and 77 of the Indian Registration Act.

In appeal, the District Judge upheld this finding of the Munsiff and was further of opinion that the document was only an agreement to divide and not a deed of partition and that the suit would not lie on this ground also.

The plaintiffs have appealed. There is nothing in the Registration Act, the Land Revenue Regulation or orders of Government as to what are the functions and duties of an Officer-in-charge of the current duties of the Deputy Commissioner and so long as the

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Government has not questioned or set aside the order passed by Mr. Paramasiva Iyer, it is not open to the Civil Court to question the legality of an order passed by an Officer as Deputy Commissioner and District Registrar. But we are of opinion that the additional ground taken by the District Judge must prevail. The document in question is not a final partition deed or one of the documents finally executed in course of partition. It is merely an agreement to divide hereafter on certain terms specified in the document and has only been stamped as such. The plaintiff's contention that it is a deed of partition must therefore fail.

The next question for consideration is whether even though the document be one, the registration of which is optional, the plaintiffs can insist upon its registration as the plaintiffs do not base the suit on any allegation that the 1st defendant had agreed to have the document registered. The learned Advocate for the appellants did not cite any authority on the point and we have not been able to find any in the published reports. It many be that, as a matter of equity and good conscience, the 1st defendant is liable to do all that is necessary to give validity to the agreement. But when the registration of the document is optional and not indispensable for its operation if otherwise enforcible, it does not seem proper to contend that 1st defendant is bound to comply with a wish of the plaintiffs to impart additional force or validity to the document. In this view the decision of the District Judge must be affirmed. This appeal is dismissed.

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## APPELLATE CIVIL.

1904.
March 2.

SREECANTA SASTRY
*v.*
PANDU RANGA UPADHYA.

*Before Mr. Justice A. Rangaswami Iyengar, and Mr. Justice H. V. Nanjundayya.*

SREECANTA SASTRY, APPELLANT, (PLAINTIFF).

*v.*

PANDU RANGA UPADHYA AND ANOTHER, RESPONDENTS, (DEFENDANTS).*

*Purohit and Joyisa—Suit for declaration of right to officiate and for damages for loss of fees.*

The plaintiff sued for establishing his right to the Pourohitya and Jyotishya in the town of Yellandur and for recovery of damages from the 1st defendant who had wrongfully received the emoluments on a festive occasion.

*Held,* that a claim of such a general and indefinite nature required very strong evidence of title to sustain it and that the fact that the plaintiff had been acting as Purohit in the place for whatever length of time was not sufficient to entitle him to a decree that no others might perform similar duties within the area claimed by him.

SUIT for declaration of right and recovery of damages. The Munsiff granted a decree as prayed for by the plaintiff. In appeal the Sub Judge reversed the decree and dismissed the plaintiff's suit.

The plaintiff preferred this Second Appeal.

Messrs. *B. Nanjundappa* and *S. Ranganna* for the appellant.

Mr. *J. C. S. Lawrance* for the respondents.

JUDGMENT—The plaintiff claims the office of Joyisa and Purohit of Yellandur, as being his ancestral property. The case for the defence is that the plaintiff and his father enjoyed the office as mortgagees under the 2nd defendant who is the rightful owner; and that the latter has since mortgaged it to the 1st defendant, who holds it as such mortgagee at present; and that the plaintiff has only a right to the mortgage debt of 90 Rs. which was tendered to him by the 1st defendant.

2. So far as documentary evidence is concerned, there is very little on either side to show who is entitled to this office. Exhibit

* Second Appeal No. 50 of 1903-04, against the decree of the Sub-Judge of Mysore in Appeal Suit No. 8 of 1903-04, reversing the decree of the Munsiff of Nanjangud in Original Suit No. 635 of 1901-02.

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III which is relied on for this purpose is a mere Sannad for an Inam land, and does not show that such Inam was given to the donee for his being either the Josya or Purohit of the place. The oral evidence is nearly equally balanced; and the conclusions of fact tha may be fairly drawn seem to us to be the following:—The plaintiff and his predecessors acted as Purohits for many years in Yellandur. The plaintiff has not made out how he or his predecessors obtained the office. The 2nd defendant and his ancestors have been regarded as in some way the Sthala Josyas of the place; but they seem to have long been absent from the place; and the alleged mortgages by the 2nd defendant to the plaintiff have not been proved.

3. We agree with the Lower Appellate Court in finding that the plaintiff has not proved any exclusive right to act as Purohit in this case. The right set up is not one which is limited to any particular time such as during any particular feast or to any particular place such as doing Pooja at a particular shrine. It is admitted that no householder is obliged to employ only the plaintiff on any specified occasions. A claim of such a general and indefinite nature requires very strong evidence of title to sustain it. The fact that the plaintiff has been acting as Purohit in the place for whatever length of time, is not sufficient to entitle him to obtain a decree that no others may perform similar duties within the area claimed by him.

This appeal is therefore dismissed with costs.

1904. March 4.

## APPELLATE CIVIL.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

LAKSHMI NARAYANA SWAMI BANK OR Co., LIMITED BY SUBBARAYA CHETTY, APPELLANT, (1st DEFENDANT).

*v.*

MADAPPA AND ANOTHER, RESPONDENTS, (PLAINTIFFS).*

*Promissory Note—Indorsee suing maker and indorser—Nature of contract between indorser and indorsee—Indorser when exempted from liability.*

The plaintiff who was the indorsee of a promissory note, sued the indorser and the maker's legal representative for the recovery of money due thereon.

* Second Appeal No. 169 of 1901-02, against the decree of the District Judge of Mysore in A. S. No. 19 of 1901-02, reversing the decree of the Principal Munsiff of Mysore in O. S. No. 270 of 1900-01.

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1904.

LAKSHMI NARAYANA SWAMI BANK v. MADAPPA.

It was contended on behalf of the indorser (Bank) that the plaintiff had willingly received the promissory note in full satisfaction of the debt due to him from the Bank and that its liability had thereby ceased.

*Held*, that the indorsee intended to recover his debt from the maker only and not from the indorser (Bank) and therefore the decision of the District Judge making it also liable should be set aside.

SUIT on promissory note. The plaintiff sued the indorser and the maker's widow for recovery of money. The Munsiff passed a decree only against the estate of the 2nd defendant's husband. In appeal the District Judge held that the 1st defendant (Bank) was also liable to the plaintiff.

The 1st defendant preferred this Second Appeal.

Messrs. *L. Sreenivasa Iyengar* and *C. S. Doraswami Iyer* for the appellant.

Mr. *B. Nanjundappa* for the respondents.

JUDGMENT—The suit was for money due upon a pro-note. It was filed by first endorsee against the endorser and the maker's legal representative. The Munsiff exempted the endorser from liability. The District Judge dissented from the finding of the Munsiff and decreed the suit against both defendants. The endorser has made a second appeal.

When the appeal was argued, the Court was of opinion that the investigation had been defective and directed the Munsiff to record additional evidence and to submit his findings on the following issues:—

"(1) Was it understood between the Bank and Subramaniah that the Bank was not liable as an endorser? and (2) Whether such understanding could be inferred from the usage of the place, or the course of dealings between the parties, or their relative situation?" The Munsiff found that "it was not understood between the Bank and Subramaniah that the Bank was not liable as endorser, and that such an understanding could not be inferred from the course of dealings between the parties or their relative situation."

From the additional evidence which was adduced by the parties, we gather that the endorser (a Bank in Mysore now under liquidation) was unable to pay its debts, that depositors and other creditors clamored for payment, that the Directors made a special order to the Manager to give away pro-notes and other securities held by the Bank, to the creditors, who chose to accept them

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in lieu of their debts, and that two days after the passing of the order, the Manager gave to plaintiffs through Subramiah (who was a depositor and who is alleged to have made a deposit for and on account of plaintiffs) the pro-note in suit which had been given to the Bank by the deceased husband of the second defendant. Subramiah and plaintiffs slept over the matter for nearly three years and then brought a suit against the Bank and the maker's widow. When we consider the circumstances under which the note was delivered to Subramiah and plaintiffs, we have no doubt that the latter willingly received it in full satisfaction of the debt which was due to them from the Bank.

Such being the facts of the case, the question which arises for decision is, whether the Bank can claim exemption from liability, when there is nothing on the face of the endorsement to show that liability was excluded. The law on the point is thus stated in Byles on Bills, fifteenth edition, page 175:--"If there be a written or even verbal agreement between an endorser and his immediate endorsee, that the endorsee shall not sue the indorser, it has been held, that such an agreement is a good defence on the part of the indorser against his immediate indorsee suing in breach of the agreement. Indeed, the contract between indorser and indorsee, does not consist exclusively of the writing popularly called an indorsement, though that indorsement be a necessary part of it. The contract consists partly of the written indorsement, partly of the delivery of the bill to the indorsee and may also consist partly of the mutual understanding and intention with which the delivery was made by the indorser and received by the indorsee. That intention may be collected from the words of the parties to the contract, either spoken or written, from the usage of the place or of the trade, from the course of dealing between the parties or from their relative situation."

If then the question of the Bank's liability does not depend totally upon the indorsement, and if it depends upon the intention of the parties which may be collected from the circumstances of the case, we are of opinion that the depositor and indorsee intended to recover his debt from the maker only and not from the Bank. We reverse the District Judge's decree and restore that of the Munsiff. The plaintiffs will pay first defendant's costs of the appeal and second appeal.

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## APPELLATE CIVIL.

1904. March 15.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge and Mr. Justice H. V. Nanjundayya.*

MADAIYA, APPELLANT, (PLAINTIFF),

*v.*

ANKE GOWDA, RESPONDENT, (DEFENDANT).*

*Indian Limitation Act, Schedule II, Arts. 132 and 147—Hypothecation as distinguished from mortgage—Limitation.*

In a suit on a hypothecation bond brought by plaintiff alleging some subsequent payments by defendant towards interest, the latter denied those payments and pleaded that the suit had become barred by time.

*Held,* that Article 147 applied to a transaction in which it was open to one party to sue for redemption and for the other party to sue for foreclosure or sale, that a hypothecation did not admit of such reciprocal rights and that suits upon hypothecation bonds for money were governed by Article 132.

*Also,* that the Chief Court had invariably been of opinion, like the High Courts of Madras and Calcutta, that a hypothecation created only a charge upon immoveable property and that it was different from a mortgage.

Suit on a hypothecation bond. The Munsiff dismissed the suit on the ground that it had become barred under Article 132, Indian Limitation Act. This was confirmed in appeal by the Sub-Judge.

The plaintiff preferred this Second Appeal.

Mr. *C. Krishna Murti* for the appellant.

Mr. *S. Shamanna* for the respondent.

JUDGMENT.—The plaintiff sued for money due upon a hypothecation bond. The question for decision is, whether the period of limitation is 12 years under Article 132 or 60 years under Article 147 of the Limitation Act.

The plaintiff contends that he is a mortgagee suing for sale of mortgaged property, and in support of his contention, he quotes the decision which is reported in Volume IV, Mysore Chief Court

* Second Appeal No. 73 of 1903-04, against the decree of the Sub Judge of Mysore, in A. S. No. 17 of 1903-04, confirming the decree of the Principal Munsiff of Mysore, in O. S. No. 657 of 1899-1900.

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Reports, page 19. The decision is not in point, since it was found in that case that "according to the defendant's own showing, the agreement appears to have been something more than a simple mortgage: for, according to them, plaintiffs had right to take possession of the land, and did in fact, take such possession as evidenced by exhibit I."

It is argued for plaintiff that the High Courts of Allahabad and Bombay have held that, a hypothecation is a mortgage within the meaning of Article 147. We are unable to follow the decisions of these two High Courts which interpret the Limitation Act in the light of the Transfer of Property Act which is not in force in this Province. The learned Judges of the High Court of Bombay state (in I. L. R. 20, B. 408) that hypothecation bonds "have, for long, been treated by this Court as mortgages and dealt with on the same principles;" and that "the principle of *stare decisis* is one of the utmost importance in questions of this nature as producing uniformity of practice." The principle of *stare decisis* compels us to hold that Article 132 governs this case, because we have invariably held, like the High Courts of Madras and Calcutta, that a hypothecation creates only a charge upon immoveable property and that it is different from a mortgage.

The High Courts of Bombay and Madras agree in the opinion that Articles 147 and 148 must be read together. "If Articles 147 and 148 are read in their plain and natural sense, they provide for two classes of suits, the object of which is the exercise of the well-understood reciprocal rights of mortgagees and mortgagors, *viz.* suits by mortgagees for foreclosure or sale on the one hand, and by mortgagors for redemption on the other."—(13 B. 96). "The whole scheme of the Act shows that, whether the suit be one for redemption, or one for foreclosure or one for sale, the decree may, according to circumstances, provide for one or other of the remedies also; and this is the same, because, the period of limitation is one and the same for all the three classes of suits."—(I. L. R. 25 M. 220). We are unable to adopt this reasoning, because we are not aware of any law which empowers a hypothecator to institute a suit for redemption. In fact, the very meaning of redemption is, that the property is not in the possession of the party who comes to Court; and the person who creates a hypothecation, keeps the property in his own possession and has no need to redeem it from any other's custody. In Provinces where the Transfer of Property Act is in

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force, it may be, that a hypothecator may sue for redemption, and that in such a suit the Court may decree redemption and direct a sale in default of payment within a specified date.

We are of opinion that Article 147 applies to a transaction in which it is open to one party to sue for redemption and for the other party to sue for foreclosure or sale, that a hypothecation does not admit of such reciprocal rights, and that suits upon hypothecation bonds for money are governed by Article 132.

We dismiss the Second Appeal with costs.

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1904. June 13.

## APPELLATE CIVIL.

*Before Mr. Justice A. Rangaswami Iyengar and Mr. Justice H. V. Nanjundayya.*

K. HANUMANTHA RAO, APPELLANT, (DEFENDANT).

v.

BATNI VENKOBA RAO, RESPONDENT, (PLAINTIFF).*

*Stamp vendor—Embezzlement in stamps—Land belonging to him sold under an order of the Deputy Commissioner—Dispossession by purchaser—Suit for possession and mesne profits against purchaser—"Revenue Officer."*

Plaintiff was a salaried stamp vendor at Shimoga, working under the orders of the Treasury Officers for the time being, the father of the defendant having been one of them. The plaintiff falsified his indents and accounts and thereby induced the Treasury Officer to entrust him from time to time with stamps of large value. Having by such deception, obtained the stamps, he misappropriated the sale proceeds to the extent of Rs. 3,732-5-0. On the embezzlement being discovered, the plaintiff was prosecuted and convicted and the Revenue Department sold his landed property to recover the amount misappropriated. In the course of that sale, the defendant's father purchased the land in suit for Rs. 1,200 on the 11th June 1894 and was put in possession on the 20th idem. The plaintiff brought a suit for the recovery of the aforesaid land, alleging that the defendant's father had wrongfully dispossessed him of the land in a so-called sale which was illegal and contrary to law. Both the Lower Courts were of opinion that the plaintiff was entitled to succeed. In Second Appeal, it was contended by the defendant that the Deputy Commissioner was competent to sell the property under the provisions of section 24,

* Second Appeal No. 35 of 1903-04 against the decree of the District Judge, Shimoga, in Appeal No. 32 of 1902-03, confirming that of the Munsiff of Shimoga in Original Suit No. 965 of 1897-98.

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K. HANUMANTHA RAO v. BATNI VENKOBA RAO.

Land Revenue Code, and that the Lower Courts should have made the payment of purchase money by the plaintiff to defendant a condition precedent to the former's recovering the land from the latter.

*Held*, that a careful consideration of the definition of the word "Revenue Officer" and of the provisions of section 24, Land Revenue Code, would show that there was no force in the contention that the stamp vendor could be regarded as a Revenue Officer.

*Held further*, that as there was nothing in the circumstance of the case from which it could be presumed that the defendant paid the purchase money at the implied request of the plaintiff or to protect his interests, the defendant was not entitled to insist on re-payment by plaintiff of the sale proceeds in this case.

SUIT for possession of land and mesne profits. The Munsiff passed a decree in favour of plaintiff and this was confirmed in appeal by the District Judge.

The defendant preferred this Second Appeal.

Messrs. *B. Nanjundappa* and *S. Ranganna* for the appellant.

Mr. *C. Krishna Murti* for the respondent.

JUDGMENT. - The facts of this case are fully stated in the judgment of the Lower Court paras 8 and 9, and need not be repeated.

The first ground is that the plaintiff cannot question the legality of the sale as the plaintiff had not paid up the amount embezzled by himself. The force of this objection is not clear. It may be admitted for the purposes of argument that a portion of the money embezzled by the plaintiff would be still due if the price paid by the defendant's father for this property be left out of account. But that cannot affect the question whether the sale held by the Deputy Commissioner was regular and such as to confer a good title to the defendant's father in the property; nor does the question of estoppel arise under the circumstances.

The second ground that the Deputy Commissioner should have been made a party to the suit was not pressed. Whether he is made a party or not, the only question for consideration is the legality of the sale and the plaintiff does not seek for any remedy against the Deputy Commissioner.

The 3rd ground also was not pressed and the point raised in it does not require any consideration.

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In connection with the 4th ground it was urged that the Deputy Commissioner was competent to sell the property under the provisions of section 24, Land Revenue Code. But a careful consideration of the definition of the word "Revenue Officer" and of the provisions of this section, would show that it is useless to contend that the Stamp Vendor can be regarded as a Revenue Officer. There is no analogy between a Treasurer being proceeded against under this section for embezzlement in stamps and similar proceedings against a Stamp Vendor, pure and simple. The liability of the former arises from his holding the Revenue Office of Treasurer, though other duties besides those relating to pure Land Revenue are attached to the appointment and the section refers to "claims for public money, or papers or other Government property" which are not necessarily connected with Land Revenue alone. Further, the order of 2nd October 1894 does not purport to ratify the sale as valid. A mere refusal to set aside the sale and restore the property that was sold, does not necessarily amount to a ratification of it. The action of Government is quite consistent with the inference that the plaintiff should have recourse to other remedies at his disposal for recovering his property.

The 5th and last ground was the one which was most urged on our attention. It is true, the plaintiff is alleged to have embezzled Court Fee Stamps to the amount of Rs. 3,732-5-0 and the sale proceeds of this property was credited towards this sum. But it is not clear on what ground it can be urged that the defendant has an equitable claim to insist upon being reimbursed in this sum before the plaintiff can get his property back. In the first place, the plaintiff does not admit that the whole amount was embezzled by himself, or that he was answerable for it, nor is there anything on record to show that a competent Court has decided that he and he alone is liable to make good the whole amount. There is also nothing in the circumstances of the case from which it can be presumed that the defendant paid the purchase money at the implied request of the plaintiff, or to protect his interests and that the plaintiff had adopted and ratified the act of the defendant. The learned Advocate argued that, that the principles of sections 196 and 197 of the Contract Act were applicable to this case. But they appear to have no bearing on the facts of the case, and we are unable to hold that the defendant is entitled to insist on repayment by plaintiff of the sale proceeds in this case.

For these reasons, the appeal fails, and is dismissed with costs.

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1904.
June 13.

## APPELLATE CIVIL.

*Befor Mr. Justice A. Rangaswami Iyengar and Mr. Justice H. V. Nanjundayya.*

T. VENKATRAMANA CHETTY AND ANOTHER, APPELLANTS, (DEFENDANTS).

*v.*

K. SUBBRAYA CHETTY AND ANOTHER, RESPONDENTS, (PLAINTIFFS).*

*Arbitration without intervention of Court—Award—Application to file it—Decree in accordance with award—Appeal—Revisional Powers of Chief Court—Jurisdiction—Civil Procedure Code, sections* 522, 525 *and* 622.

Under an agreement entered into between the parties, they submitted their differences to panchayatdars for settlement. The latter gave an award. The plaintiffs applied to the Court under section 525, Civil Procedure Code, to have the award filed. The Munsiff passed a decree in accordance with the award after considering the objections urged by the defendants against it. The defendants preferred an appeal and it was contended on the other side that no appeal was allowable under the Code in the present case.

*Held*, that the decision of the Lower Appellate Court that the appeal was inadmissable under the limitation laid down by section 522, Civil Procedure Code as the decree of first Court was in accordance with the award, was correct.

*Also*, that there was no illegality or material irregularity in the Munsiff having accepted the award so as to justify an interference with the decree under section 622, Civil Procedure Code.

Awards of arbitrators are such proceedings as the Courts ought to strive to uphold and not to go out of the way to discover flaws for rendering them ineffectual. (*See* observations in *Ramdhan Singh* v. *Karan Singh*, I. L. R. XVIII, All. 414; Russel on Arbitrators, p. 300.)

Application under section 525 of the Civil Procedure Code. The Munsiff passed a decree in terms of the award. The defendants preferred an appeal which was dismissed by the Sub Judge on the ground that the appeal was inadmissible.

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* Second Appeal No. 128/Civil Revision Petition No. 106 of 1902-03, against the decree of the Sub-Judge of Mysore in Appeal No. 55 of 1902-03, confirming the decree of the Court of the Munsiff of Seringapatam in Original Suit No. 689 of 1901-02.

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T. VENKATRAMANA CHETTY v. SUBBARAYA CHETTY.

The defendants preferred this Second Appeal.

*Messrs. B. Nanjundappa and S. Ranganna* for the appellants.

*Messrs. S. Narayana Rao and M. C. Ranga Iyengar* for the respondents.

JUDGMENT—The Subordinate Judge has held that the appeal was inadmissible under the limitation laid down by Section 522 of the Civil Procedue Code, as the decree of the First Court was in accordance with the award. The appellants do not dispute the correctness of the reason given by the Lower Appellate Court, which, in our opinion, was quite right in dismissing the appeal on that ground.

The grounds of Second Appeal are all based on the findings which the Subordinate Judge has, somewhat unnecessarily, recorded on the merits of the objections raised by the appellants. Assuming that he had no jurisdiction to take cognizance of the case in appeal, we must take it as a necessary consequence that no legal significance can be attached to these opinions. The Lower Appellate Court having therefore rightly thrown out the appeal, this Second Appeal is also groundless and is dismissed with costs.

The appellants who were the defendants in the First Court, have also put in a petition of revision under Section 622 of the Code. The same objections as were taken in the Courts below are again brought forward, namely, that the arbitrators have left undecided certain matters that had been referred to them. The Munsiff has considered these points in paragraphs 4 to 12 of his judgment in a clear and intelligent manner. We agree on the whole with the conclusions arrived at by him. We cannot find that he has acted illegally or with material irregularity in having accepted the award, so as to justify our interference with the decree. (*Ghulam Khan* v. *Muhamad Hassan* I. L. R. XXIX, Cal. 167). Awards of arbitrators are such proceedings as the Courts ought to strive to uphold, and not to go out of the way to discover flaws in for rendering them ineffectual (*see* the observations in *Ranudhan Singh* v. *Karan Singh* I. L. R., XVIII All. 414; RUSSEL ON ARBITRATORS, p. 300).

For these reasons, the petition is also rejected.

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June 17.

# APPELLATE CIVIL.

*Before Mr. Justice A. Rangaswami Iyengar,*

*and Mr. Justice H. V. Nanjundayya.*

RAMIAH, APPELLANT, (PLAINTIFF).

*v.*

BASAVIAH AND ANOTHER, RESPONDENTS, (DEFENDANTS 3 AND 4).*

*Hypothecation—Property in possession of mortgagor—Damage done to it by third parties—Right of mortgagee to sue them.*

The plaintiff sued for recovery of money due on a hypothecation bond and two persons who had caused damage to the hypothecated property were also made parties to the suit. It was contended on behalf of the latter that they were wrongly joined as defendants and that they were not liable to make good the damage caused by them.

*Held*, Per Justice RANGASWAMI IYENGAR :—That even a simple mortgagee would have the right to claim that value of damages caused to the mortgaged property should be security for the satisfaction of his debt when the property was insufficient to meet the same.

Per Justice NANJUNDAYYA :—That the interest of a simple mortgagee in the mortgaged property was as real and certain as that of a reversioner and therefore there was no reason whatever why the wrong to him in such a case as the present should go without a remedy.

SUIT on a hypothecation bond and for recovery of damages from some of the defendants. The Munsiff passed a decree in favour of plaintiff and the same was modified in Appeal by the District Judge who held that the 3rd and 4th defendants were not liable in damages to the plaintiff.

The plaintiff preferred this Second Appeal.

Mr. *S. Narayana Rao* for the appellant.

Messrs. *L. Sreenivasa Iyengar* and *C. S. Dorasami Iyer* for the respondents.

JUDGMENT—Mr. Justice A. RANGASWAMI IYENGAR.—The suit was brought for the recovery of money due under a deed of hypothecation of a house executed by the deceased husband of 1st defend-

* Second Appeal No. 115 of 1902-03 against the decree of the District Judge of Mysore, in Appeal No. 16 of 1902-03 modifying the decree of the Court of the Munsiff of Seringapatam in Original Suit No. 171 of 1901-02.

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ant and father-in-law of 2nd defendant. The 3rd defendant has obtained a second hypothecation of the same house from 1st defendant. He and 4th defendant are impleaded on the ground that they have removed 9 doors belonging to the house with intent to lower the value of the plaintiff's security.

2. The 1st and 2nd defendants do not dispute plaintiff's claim and 1st defendant has admitted as plaintiff's witness that 9 doors have been removed and that her previous statement that 3 doors had been stolen, that 2 doors were in the house and that she had left 4 doors with 4th defendant for safe keeping, had been made at the instigation of 3rd defendant. The 3rd and 4th defendants pleaded that they were wrongly joined as defendants in this suit and that they were not liable to make good the value of the 9 doors.

3. The only question for disposal in this Second Appeal is, whether either the 3rd or 4th defendant could be made liable for the value of the doors in this suit, and if so, for how much.

4. The Lower Appellate Court has held that plaintiff was not in possession of the house, that he was only entitled to the money due on his hypothecation, that he has not proved that the house in its present condition could not satisfy the decree amount, and that he could not proceed against the 3rd and 4th defendants for damages caused by the removal of the doors. Though the Transfer of Property Act is not in force in this Province, there is no objection to adopt and follow any of its provisions which are considered reasonable and consistent with equity and good conscience. But there is no expression on this point in it nor is there, on the other hand, any direction that a hypothecatee has no remedy against a wrong-doer whose acts are calculated to impair the value of the security. The provisions of this Act and of the English Law of Mortgage which lay down that a simple mortgagee cannot sue the mortgagor for his money before due date on account of the deterioration of the property or for wilful waste, unless the value of the security decreased below certain limits cannot serve as a guide to us in the present instance. No precedents were quoted in argument and no cases similar to the one in dispute could be traced in the published Law Reports. The question has therefore to be considered on general principles.

5. It is true that in a case of simple mortgage the creditor has to rely only on the personal security of the mortgagor and the security of the mortgaged property. In ordinary cases where the personal

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security subsists, it will be immaterial to enquire whether the mortgagor was liable for wilful or malicious waste of the mortgaged property even when its value is found to be insufficient to meet the claim. Suppose the personal liability gets time-barred and the property is insufficient to satisfy the demand on it, the question may arise in some cases whether the mortgagor should not be held personally liable in damages for loss or deterioration oft he security, by any act or injury wilfully caused by the mortgagor himself, would it be right or consistent with equity and good conscience to say that the plaintiff shall rest satisfied with what he can get out of the mortgaged property and that the mortgagor shall not be liable to make good the loss he has caused by his tortious act? To hold that he shall go scot free will be to offer a premium to dishonesty or fraud on the part of the mortgagor. Similarly, where the wrong-doer is a third party unconnected with the mortgagor, the same argument would seem to be fairly applicable. It is true that the mortgagor as the person in actual possession of the property or possessing the right to such possession may have the direct right to sue the wrong-doer for damages. But he may or may not care to sue for such damages and make such damages available for the benefit of the mortgagee. It therefore seems only reasonable that though the simple mortgagee has no right to claim the damages for the injury to the security in his own right as mortgagee, he should have an equitable right to demand that the damages due on account of the injury shall be made available to him in case the security in its depreciated condition is not sufficient to satisfy his claim. In this view, it seems proper to hold that even a simple mortgagee should have the right to claim that the value of damages caused to the mortgaged property should be security for the satisfaction of his debt when the property is insufficient to meet the same. Whether a mortgaged property has deteriorated in value so as to be insufficient to meet a debt or not is a question of fact. Though it is possible to adduce evidence as to the market value of a property, such value may often either fall short of or exceed the actual price fetched by it in a subsequent public sale and the raising of such an issue would seem to be useful only for the decision of the question whether the wrong-doer should or should not be made a party in a suit for the mortgage amount. The Munsiff has failed to raise the issue but the defendants 3 and 4 cannot reasonably complain of this omission as they have not pleaded that the property in its present condition was sufficient to meet the decree. Moreover, they will not be prejudiced in any way

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if the decree be so framed as to make their liability for the value of the shutters contingent upon the house not fetching the full amount of the decree in auction sale.

6. The remaining questions for consideration are :—How many of the shutters are missing and for how many are 3rd or 4th defendant responsible ? It is not clear on what evidence the District Judge set aside the finding of the Munsiff and held that 2 doors were still in the house, that 4 doors were kept in safe custody and that only 3 had been lost. The plaintiff and 1st defendant have deposed on oath that there are no doors in the house and 1st defendant has denied the allegation that she left 4 doors with 4th defendant. The 3rd and 4th defendants have not been examined and the Munsiff has discredited their two witnesses for good reasons. He was also right in concluding upon the strength of the evidence of the Police Daffedar and the 4th witness that the 4th defendant had removed 9 doors in 2 batches. But there is nothing to implicate the 3rd defendant in such removal. None of the witnesses refer to him and he does not admit in his written statement joint liability with 4th defendant even for the receipt by the latter of the 4 doors for safe keeping. He must, therefore, be absolved from liability and the 4th defendant alone can be held answerable for the value of the missing doors. The value fixed by the Munsiff for the 9 doors seems to be fair and may be accepted.

7. The District Judge was also wrong in making 1st and 2nd defendants personally liable for the decree amount. The decrees of both the Lower Courts must therefore be modified and the plaintiff awarded the amount claimed in plaint with his costs in the Court of First Instance and interest thereon at 6 per cent. from date of decree from the hypothecated property and other assets of the deceased obligor. If the full amount be not realized from the said house, the 4th defendant shall be liable to make good the deficit to the extent of Rs. 45 and interest thereon at 6 per cent. from date of Munsiff's decree. The 4th defendant shall pay the costs of the plaintiff in the Lower Appellate and in this Court. The 3rd defendant shall bear his own costs throughout.

Mr. Justice H. V. NANJUNDAYYA :—I concur. There is a rule of English Law that the only person who can sue for a trespass to land, is the person who is in possession, actual or constructive. But where the trespass causes a permanent injury to the land affecting the

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value of the inheritance, a person entitled to the reversion may sue for the injury to his interest, and may do so at once without waiting until his estate falls into possession. (CLERK AND LINDSELL ON TORTS, p. 286). This rule applies to landlords and tenants (BIGELOW'S LEADING CASES ON TORTS, p. 354, &c., *Venkatachalam* v. *Andiappan* (I. L. R. 2 Mad. 232). The case of a simple mortgagee is analogous and his interest in the mortgaged property is as real and certain as that of a reversioner. There is no reason whatever why the wrong to him in such a case as the present should go without a remedy.

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February 10.

## APPELLATE CIVIL.

*Before Mr Justice A. Rangaswami Iyengar, and Mr. Justice H. V. Nanjundayya.*

SIDDALINGAPPA, APPELLANT (PLAINTIFF).

v.

SYED AJIMAI PEER SHAW KHADRI *alias* BABJEE SAB, RESPONDENT, (DEFENDANT).*

*Civil Procedure Code, Sections 150, 375—Razinama petition—Compromise or adjustment—Fresh issue raised therein—Inclusion of matters not the subject of suit—Section of the code applicable to such petitions—Court's power to entertain them—Decree in those terms, whether proper.*

In a suit for the recovery of produce of some land, the parties filed a razinama and agreed to abide by its terms. The Court received it and appointed a Commissioner to report on a matter referred to in the agreement. On receipt of the Commissioner's report, the Court passed a decree in accordance with it.

*Held*, (1) that the terms of the application fairly came under Section 150, Civil Procedure Code; (2) that the Munsiff acted rightly in admitting the agreement and referring the question to the District Surveyor; (3) that the inclusion of other stipulations which did not clash and were not inconsistent with those relating to the matters in dispute, could not vitiate the agreement; and (4) that as the inclusion was not a condition precedent for the parties abiding by the agreement, those reliefs might be safely removed without subjecting the parties to any perceptible disadvantage.

Suit for produce or its value. The Munsiff passed a decree in terms of a Razinama application filed by the parties.

The plaintiff preferred this Regular Appeal.

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* Regular Appeal No. 66 of 1903-04/Mis. Appeal No. 28 of 1903-04 against the decree of the Munsiff of Tumkur, in O. S. No. 272 of 1902-03/Mis. No. 70 of 1903-04 and Execution Case No. 92 of 1903-04.

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SIDDALINGAPPA. v. SYED AJIMAI PEER SHAW KHADRI.

*Messrs. L. Sreenivasa Iyengar and C. S. Dorasami Iyer* for the appellant.

Mr. *S. Narayana Rao* for the respondent.

JUDGMENT—The plaintiff sued for the recovery of 240 maunds of jaggery valued at Rs. 360, alleging that it was wara due on lands leased to defendant for growing sugar-cane.

The defendant denied the lease and pleaded that plaintiff had instituted this false suit to usurp defendant's land.

2 The Munsiff of Tumkur framed the following amended issues:—

(1) Whether plot marked B on plan exhibit No. I is plaintiff's and whether the same had been leased by plaintiff to defendant.

(2) To what relief, if any, is plaintiff entitled ?

3. When the case came on for final hearing, the plaintiff was examined as his first witness and then the plaintiff and defendant filed an application on 10th February 1903 to which the Munsiff refers in his notes as follows : "Note—Both parties file a Razinama application and pray for a decree in its terms, after appointing a Commissioner and ascertaining the exact measurement of each of the plots A and B marked on exhibit I." The Munsiff selected the District Surveyor as Commissioner on the suggestion of the Pleaders on both sides and ordered that he should inspect the plots in presence of both parties and submit a sketch, giving the measurement of each plot and also other particulars required in the petition.

4. On the District Surveyor submitting the sketch and report, he was examined and the Court decided that, "according to the Commissioner's plan and report, the block A is itself more than 10 candies in extent and the plaintiff is not entitled to any further extent from out of the block B marked yellow on the plan, draw up a decree according to the Razinama, the block A being for plaintiff and the block B for defendant."

The plaintiff has appealed in Regular Appeal No. 66 against this decision. The defendant having sued out execution of the decree and obtained possession of block B, the plaintiff has presented Mis. Appeal No. 28.

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6. In Appeal 66, the Counsel for the appellant argued that the application in question should not have been admitted or acted upon by the Munsiff. The first point for consideration therefore is what provision of the Civil Procedure Code is applicable to this petition. The petition is in purport as follows: The 10 candy land known as "Khade Totada Jamin" (block A) referred to in this case is only the plot which is situate to the west of the garden belonging to the plaintiff's elder brother Sidda Basaviah and Giasudin Shah Khadri. By Krishnaraj wet 10 candies is meant 10 candies of 160 seers each. Should there not be 10 candies in plot A, the plaintiff should be given so much portion of the land in plot B which is to the east of the land belonging to the said 2 persons as would make up the said 10 candies and the rest should remain in possession of defendant and the defendant should consent to a decree as sued for. If there be 10 candies in block A, block B should go to the defendant and the plaintiff should give up the amount sued for in plaint and pay defendant's costs. The Advocate for the appellant contended that, if at all, it could be only a case stated under Section 527, Civil Procedure Code, and should not be admitted in this suit and that it cannot amount to a compromise under Section 375 as the petition does not refer to an adjustment in whole or in part of the matter of the suit. The Advocate for the respondent cited Sections 150 and 151 and contended that the parties were competent to state an issue on question of fact or law and ask the Court to proceed to a decision upon its finding on such issue. It was then argued by the other side that this provision could be resorted to only at or before the issues were framed and not after the case proceeded to final hearing and the circumstance that these sections were contained in the chapter relating to the statement of issues was relied upon in support of this argument. This contention appears to have no force in it. It is competent to the Court to frame additional issues or amend the existing issues before the passing of a decree and it is open to the parties to apply to the Court in the matter of such issues or in any other matter which will facilitate a settlement of their disputes. The accident of the sections being continued in the chapter relating to the framing of issues should not limit their scope or utility. The terms of the application fairly come under Section 150. Although the land itself had not been sued for, the question whether block B belonged to the plaintiff or defendant was an issue in the case and the parties appear to have considered the extent of block A as a crucial test of the point whether the whole or a portion

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of B properly belonged to the plaintiff. Under these circumstances, the parties were at liberty to raise the question of fact referred to in the petition, *viz.*, whether the land block A was 10 candies in extent or not and state it in the form of an issue to the Court and agree to the award of the decree as per plaint or its dismissal upon the finding of the Court in such issue. They have in addition also provided in the petition that the defendant shall give out of block B land sufficient to make the extent of A equal to 10 candies. But whether it is a matter in dispute in this suit or not, it is not a clause or condition which can vitiate the agreement or oust the jurisdiction of the Court to accept and take action upon the petition. This case is very similar to what is reported at 29 C. 306. In that case, in a dispute as to whether a particular piece of land was included in the plaintiff's or defendant's holding, the parties agreed to the appointment of a Pleader as Commissioner and to be bound by his decision as to whether plaintiff or defendant was in possession of the land on either side of the khal in dispute. The High Court held that it was an agreement under Sections 150 and 151, Civil Procedure Code, and that a decision in accordance with the Commissioner's opinion was final and not open to appeal. In the present case, the parties submitted the question to the Court and asked him to appoint a competent measurer. There can therefore be no question that the Munsiff acted rightly in admitting the agreement and referring the question to the District Surveyor.

7. The next ground of appeal which deserves consideration is, whether the Mojnidar was correct in adopting 500 square yards as the extent of a kolaga of Krishnaraj kandy of 160 seers. That this is not the standard measurement is not seriously maintained. It is urged that the plaintiff meant that the extent of 800 square yards would be adopted according to the local usage. But this is not referred to in the petition and the plaintiff is not entitled to graft such a condition on the agreement now. On this point also the case quoted in the previous para is directly in point. There also the unsuccessful party tried to back out of the agreement by pleading that he understood by possession past as well as present possession and not present possession alone. But the Munsiff overruled the plea and the High Court upheld his decision.

8. The next contention is, whether the Munsiff was justified in disposing of the case on this compromise which included matter which could not be dealt with in this suit and whether the decree



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actually passed is in proper form. The decision reported at 18 M. 410 and 22 M. 214 are of great help in forming an idea of the principles on which these questions should be dealt with. It was decided in the former case that where a compromise under Section 375, Civil Procedure Code, provided *inter alia* for certain relief which could only have been given by the Court in a suit based upon a different cause of action, the decree should have been passed only in the terms of such of the provisions agreed upon as related to relief which the Court could have given in the suit. The Court observed at page 414—"It seems reasonable to hold that the words 'so far as it relates to the suit' in section 375 must be restricted to relief which the Court could have given in the suit, and will not embrace reliefs which could only have been given in a suit based upon a different cause of action. . . . ." With reference to the remaining clauses being embodied in the decree, the Court observed that the view to the contrary held in the case reported at 13 Cal. 170, failed to give full effect to the directions in section 375 that "the Court shall pass a decree in accordance therewith so far as it relates to the suit" and that they concurred with the decision of Scott, J. in *Ruthonsing Lalji* v. *Pooriboi* (7 B. 304), directing that a decree do issue in accordance with the agreement so far as it related to the subject matter, which was approved and followed in *Appasami* v. *Manickam* (9 Mad. 103). The principles of these decisions clearly apply to the present case though the wording of section 150 is somewhat different from that of section 375. Clause (b) relates to provision in the agreement of the former section for delivery of property specified in the agreement and in dispute and (c) relates to either party doing or abstaining from any act specified in the agreement and relating to the matter in dispute, both of them not being outside the relief sought in plaint. As already observed in para 6 above, the inclusion of other stipulations which do not clash and are not inconsistent with those relating to the matters in dispute cannot vitiate the agreements. And section 151 directs that judgment shall be given according to the agreement implying, of course, only such terms as relate to the matter in dispute. The decision of Davie and Benson, JJ. reported at 22 M. 214, does not necessarily clash with the former decision. It only amplifies it and carries it to its logical conclusion. It directs that, when the terms of the compromise did not give to the plaintiffs any of the reliefs sought for in the plaint, a decree should not be passed in its terms and that the suit should not be dismissed but should

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be proceeded with if it appear that the compromise was arrived at on condition of its being incorporated in the decree. The circumtances referred to in this case do not exist in the present suit.

9. It will be seen that the petition in question contained the stipulations that if the finding of the Court on the issue stated was unfavourable to the plaintiff, his suit should be dismissed and that defendant should keep the land which related to the subject matter in dispute, while if it was favourable, he should have a decree according to suit with costs besides getting additional land. There is nothing to presume that the inclusion in the decree of the additional reliefs which were not asked for in the plaint was a condition precedent for the parties abiding by the agreement and these reliefs can therefore be safely removed from the decree without subjecting the parties to any perceptible disadvantage. The decree of the Munsiff will accordingly be modified. The decree will direct that the plaintiff's suit be dismissed and that each party bear his own costs in this and the Lower Court.

10. As a consequence of this modification it follows that the Lower Court was wrong in ordering execution for the delivery of possession of block B to the defendant and that the Mis. Appeal should be allowed, each party bearing his own costs.

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# APPELLATE CIVIL.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

IN APPEAL NO. 13.

B. GOVINDA RAO AND ANOTHER, APPELLANTS, (DEFENDANTS 1 AND 2).

*v.*

THE DEPUTY COMMISSIONER, BANGALORE DISTRICT, RESPONDENT, (PLAINTIFF).

IN APPEAL NO. 30.

B. SUBBA RAO, APPELLANT, (3rd DEFENDANT).

*v.*

THE DEPUTY COMMISSIONER, BANGALORE DISTRICT, RESPONDENT, (PLAINTIFF).*

*Land Acquisition Regulation, sections 23 clause (1), and 24—Market value of land at the time of Notification—Mode of calculating market value and amount of compensation.*

One Balekayee Sheshappa who was the holder of Survey No. 87 in the Guttahalli Village of the Bangalore Taluk, mortgaged it to one Mr. Sreenivasa Iyengar in 1857 for Rs. 756. When the Western Extension of the Bangalore City was planned, the mortgagee transferred his title and interest to the Municipality and received the full amount of the mortgage money. The 1st, 2nd and 3rd defendants stated to be the grandsons and the 4th defendant the daughter-in-law of Sheshappa claimed compensation. An offer of Rs. 100 per acre was made to them in settlement of their claim in consideration of the delay caused to them, although the adjoining lands were acquired at rates varying from Rs. 70 to 102¼ an acre. As this was not accepted, the Deputy Commissioner of Bangalore referred the matter to the Sub Judge under Section 18 of the Land Acquisition Regulation. The Sub Judge decreed that compensation should be paid at the rate of Rs. 150 per acre with interest at 6 per cent. per annum from the date of original acquisition in 1889. In appeal against the decree the defendants contended that the amount of compensation awarded was very inadequate and that the mode of calculating the same was incorrect.

*Held*, that, according to the strict provisions of the Regulation, the market value at the time of publication of the Notification must be adopted.

* Regular Appeals Nos. 13 and 30 of 1901-02, against the decree of the Sub Judge of Bangalore in Original Suit No. 698 of 1899-00.

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*Held further*, that though, as a matter of fact, the Municipality in this case had added the land into the Western Extension and converted it into road and building sites, yet for purposes of calculation of the compensation, the land should be looked upon as mere dry land assessed to land revenue and subject to all incidents applicable to such land under the Land Revenue Regulation;

*Held also*, that the contention of the appellants that they should be paid a'l the money realized by the Municipality by the sale of sites irrespective of the lands set apart for the roads or of the costs incurred in making the approach roads and parcelling them out into sites &c., could not therefore be accepted.

REFERENCE under section 18 of the Land Acquisition Regulation. The Sub Judge passed a decree awarding compensation to the defendants at a certain rate per acre.

The defendants Nos. 1 to 3 preferred these Regular Appeals.

Mr. *S. Subbaraya* for the appellants in Regular Appeal No. 13.

Mr. *D. Venkataramayya* for the appellant in Regular Appeal No. 30.

Mr. *S. Ramaswami Iyer* for the respondent (Government).

JUDGMENT—These are appeals against the decision of the Sub Judge of Bangalore in O. S. No. 698 of 1899—1900. The facts of the case are:—

Land Survey No. 37, extent 9 acres 23 guntas, belonged to one Seshappa. He had mortgaged the same to Mr. Srinivasiengar, retired Assistant Commissioner, for Rs. 756 on 10th June 1867. For forming the Western Extension called Chamarajendrapett, Mr. A. Srinivasachar, Vice-President of the Bangalore Municipality, acquired dry lands about 1889 and 1890. As the whereabouts of the mortgagor or of his representatives were not known, he took an assignment of the mortgage from Mr. Srinivasa Iyengar on 9th July 1889. The land was included in the extension, roads and tunnels were constructed and sites were marked and allotted or sold to people in due course. Seshappa's sons commenced to petition the Municipality on 8th January 1891 and kept on making representations with no avail for many years. The successors of Mr. Srinivasachar in the Vice-Presidentship appear to have labored under the mistaken notion that the lands had been acquired outright from Mr. Sreenivasa Iyengar and that he was answerable to the petitioners if at all. But ultimately the mistake was discovered, and proceedings were taken

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for formally acquiring the land under the provisions of the Land Acquisition Regulation. A Notification was issued by Government on 19th September 1898. The Deputy Commissioner made an award on 29th November 1899 at the rate of Rs. 100 per acre plus 15 per cent. which the claimants refused and he referred the case to the Sub Judge on 2nd March 1900.

2. The defendants pleaded that the Municipality had realized Rs. 7,000 from the land and that they were entitled to recover Rs. 10,904, including interest. They appear to have raised their demand subsequently claiming at the rate of 1¼ rupee per sq. yard.

3. The Sub Judge held that the Municipality intended to acquire absolute ownership in 1889, that the mortgagee's rights were acquired in 1889 and the equity of redemption in 1898 and that compensation should be paid at the rate of Rs. 150 per acre with interest at 6 per cent. per annum from the date of the original acquisition in 1889.

4. Against this decree, the defendants have appealed on the grounds that the compensation should be computed on the market value of the lands on the date of the Notification under the Land Revenue Regulation and that the application of one of them for compensation at Rs. 200—250 an acre should not be acted upon.

5. The first question for consideration is, therefore, with reference to what date should the market value of the land in question be ascertained. The facts of this case are peculiar. It is not similar to cases which are ordinarily expected to occur under the provisions of the Land Acquisition Regulation. The Regulation contemplates only cases in which the taking of possession of the land, nay, even the preliminary investigation into the nature and extent of the land is not proceeded with before a declaration is published under section 6 or 5 of the Regulation that the land is needed or likely to be needed for a public purpose. Then the Deputy Commissioner has to make an award of compensation before he can proceed to take possession under section 16. But here the land had been acquired privately by the Municipality from the mortgagee and parcelled into sites and disposed of many years (nearly ten years) before steps were taken under the Land Acquisition Act. It is a mere fiction and that a very strained one at best to say that the land was fit to be dealt with under the Land Acquisition Act. If the

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award passed by the Deputy Commissioner is not agreed to by the claimants, under ordinary conditions, the Deputy Commissioner has the option of declining to take up the land and letting it remain with the claimants. That course is not open to him in the present instance. The land is not even in the possession or control of the Deputy Commissioner. The condition and shape of the land has been irretrievably altered, third parties have entered upon occupation of different plots and have acquired and created new rights. Thus, while the conditions necessary for action under the Land Acquisition Regulation are absent, there are very good reasons for thinking that the Municipality would have been better able to meet the claim of the defendants under the ordinary law. Mr. Srinivasacharriar has deposed that the heirs of the original mortgagor were not then known. It is not likely that an experienced Officer and able Lawyer like him would have been content with the acquisition of the mortgagee's rights if the other claimants could have been traced. He was able to acquire many lands then at about 100 rupees an acre and it is not seriously contended that the value of the land was very much higher in 1889. This will be further clear from the fact that one of the claimants did not ask for more than 200 – 250 Rs. an acre even after the improvements had been projected and made. It was therefore not at all likely that the claimants would have pressed for the recovery of the lands or would have succeeded in their claim if they had persisted. They would only have obtained the value of the lands at the time of the acquisition by the Municipality with reasonable interest by way of damages. The wisdom and propriety of bringing this case therefore under the Land Acquisition Regulation appears to be questionable. It would have evidently been more correct and fair to all parties to have left the claimants to seek their remedies in the Civil Courts against the Municipality, if the matter could not be amicably settled in private.

6. Now that, however, the provisions of the Land Acquisition Regulation have been resorted to, the directions therein laid down must be accepted and followed on the various points in dispute. By section 23, clause 1, it is provided that "in determining the amount of compensation to be awarded for land acquired under this Regulation, the Court *shall take into* consideration the market value of the

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land at the date of the publication of the declaration, relating thereto under section 6." The wording is clear and no discretion is left to the Court in the matter. As a converse of this provision, section 24 lays down that the Court shall not take into consideration any outlay or improvement on the land after the date of the publication of the declaration. Even under the older enactments, it has been held that "the market value at the time of awarding compensation, may fairly be taken to mean 'at the time when proceedings under the Act are taken,' as opposed to its known market value in the past and its probable market value in the future." 15 Bom. 279 p. 286. It must therefore be held that, according to the strict provisions of the Regulation, the market value at the time of the publication of the Notification must be adopted.

7. The next question for determination is how the market value of the land should be calculated and what is its amount. The land was dry land and assessed to land revenue when it was taken up by the Municipality. After the extension was laid out and the land had been parcelled out and given away to private persons to build, the land revenue must have been remitted. The question is whether the land should be valued as it is at present, *viz.*, as sites on which houses are standing or may be built or as mere dry land, paying assessment to Government and subject to all the incidents of an agricultural land. Though, at the time of the Notification, the land had become building site, yet it was only because the Municipality had changed its condition and included it in the extension and if the defendants succeed in recovering the same, it must be only as agricultural land. In considering the method of valuation to be adopted, the earliest decided case that may be referred to with advantage is the one reported at 2 Cal. 103. The case arose in connection with buildings and land in Calcutta and it was held that "the measure of compensation should be such as is warranted by the current price of similar property in the neighbourhood without any special reference to the uses to which it may be applied at the time when it is taken by Government" and that the market value should be calculated not according to the present disposition of the land but according to the "most lucrative way in which the owners could dispose of it." The next case is the one reported at 10 Bom. 585. In this case the land had been originally devoted to agricultural purposes and contained also a number of fruit trees and some

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buildings and was in the form of a square enclosed and surrounded by houses on all sides except on one side where it opened on another piece of garden land. The District Judge preferred to assess the compensation on the principle of the above mentioned case. He estimated what the value of the land would be if roads were made and the remaining land were parcelled out into suitable sites. The Judges of the Bombay High Court, however, held that such a method of calculation was unsuited where a large area was concerned and when there was no demand for house building and allowed compensation at the rate of 1½ anna per yard.

8. The principles enunciated in these two cases clearly apply to this case with one important point of difference, *viz.*, the lands, in the two cases, were either house property or such as were capable of being utilized for building purposes without let or hindrance from any one. Though, as a matter of fact, the Municipality in this case have added the land into the Western Extension and converted it into road and building sites, yet, for purposes of calculation of the compensatien, the land should be looked upon as mere dry land assessed to Land Revenue and subject to all the incidents applicable to such land under the Land Revenue Regulation. Under section 63 (1) of this Regulation, an occupant is entitled to appropriate land to agricultural purposes and to erect thereon farm buildings and dwelling houses for agriculturists and their labourers. Under clause 2, he must obtain Deputy Commissioner's permission to appropriate it to any other purpose and under clause 3, he is liable to pay for such permission such fine as may be prescribed in addition to any new assessment under section 48 which provides for a ground rent for land used as house sites. Rule 58 (*see* Rules under the Land Revenue Code) fixes the limit of the fine under section 63 at 25 times the assessment of the land not exceeding Rs. 200 per acre and Rule 59 provides for the levy of fines in large towns or near Railway Station at rates reaching up to 1,000 Rs. per acre when permitted by Notification of Government, *see* also Rules 57 and 61.

9. The claimants cannot therefore claim as a matter of right to dispose of the land as a building site or to have the probable income from such a profitable disposition considered in fixing the market value. They can at best only insist upon the adoption of the highest value of the land utilized to the best advantage as an agricultural land. Their contention that they should be paid all the money realized by the Municipality by the sale of the sites and that,

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irrespective of the lands set apart for roads or of the cost incurred in making the approach roads and parcelling them out into sites, &c., cannot therefore be accepted. There is no evidence to show what was the price of agricultural land of similar quality in the neighbourhood at or about the time of the publication of Notification under section 6 of the Land Acquisition Regulation. The evidence in record only shows that the land contiguous to that in dispute was acquired in 1889—90 at about Rs. 100 and that the prices of lands around Bangalore had risen considerably.

10. We may safely assume that, if the provisions of the Regulation had been set in motion in 1889 or 1890, the compensation would not have exceeded Rs. 150 per acre and that the amount fixed by the Sub Judge is not actually hard or unjust to the claimants. But since we have held that the compensation should be calculated with reference to the market value of the land on the date of the Notification and as the action of the Municipality has had the effect of keeping the claimants out of their just rights for a long time and putting them to no end of inconvenience, we think a more liberal rate should be adopted. In O. S. No. 23 of 1892 (*vide* exhibit 9), the District Judge, after taking the opinion of assessors appointed by the Deputy Commissioner and defendants, awarded compensation at the rate of Rs. 1,000 per acre of mango garden land, and Rs. 400 - 550 per acre for dry land. These lands were, however, situated much nearer to the Fort and the new Targupett than the land in dispute. In the claim put forward by the parties in the earlier petitions, about Rs. 250 per acre has been mentioned. It will, therefore, not be unfair to either party to award compensation at Rs. 250 per acre with the usual 15 per cent. and interest at 6 per cent. from date of the Notification as the land had been taken up even before the date of such Notification. No value is allowed for the trees as it has not been claimed in appeal and as it must be very small.

11. The appellants claim the land to be 9 acres, 27 guntas in extent. But both in the Notification and in the reference of the Deputy Commissioner, the extent is given as 9-23 and the defendants have not objected to it. The deeds of mortgage and assignment contain only the bijavari prior to survey. The extent must, therefore, be taken at 9 acres, 23 guntas.

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The amount of compensation may be computed as follows :—

| | | | | |
|---|---|---|---|---|
| Value of 9 acres, 23 guntas at Rs. 250 plus 15 per cent. or 37-8-0 ... ... ... | Rs. | 2,752 | 13 | 0 |
| Deduct amount of mortgage ... ... | „ | 756 | 0 | 0 |
| Balance | Rs. | 1,996 | 13 | 0 |

12. There will accordingly be a decree for the appellants for Rs. 1,996-13-0, interest thereon at 6 per cent from 19th September 1898 with proportionate costs in both Courts and future interest on the aggregate amount at 6 per cent.

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## APPELLATE CIVIL.

1904, February 17.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

SREEDHARA RAO, APPELLANT, (PLAINTIFF).

v.

SREENIVASA RAO, RESPONDENT, (DEFENDANT).*

*Contribution Suit—Co-owner of a jodi village suing another after division—Tank—Cost of repairs thereto—Payment thereof by the former to Government—When cause of action arises—Limitation—Land Revenue Code—Applicability to suits by private individuals.*

A co-owner of a jodi village sued another in 1902 for contribution of a portion of Rs. 548-6-7, which the former had paid to Government in 1895 for the cost of some repairs which the Government had executed to a tank in the village while it remained under their management, alleging that the cause of action arose in September 1901 when the defendant obtained a decree against plaintiff for his one-sixth of the said village. It was contended that the suit was barred by time.

*Held*, that the provisions of the Land Revenue Code which empowered Government to recover certain charges in the same manner in which arrears of Land Revenue might be recovered, did not apply to a claim made by a private individual and that the cause of action, if any, arose in June 1895 when the cost of repairs was paid by plaintiff to Government and therefore the suit was barred.

SUIT for contribution. The Munsiff dismissed the suit on the ground that it was time-barred.

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* Regular Appeal No. 43 of 1903-04, against the decree of the Munsiff of Maddagiri in Original Suit No. 195 of 1902-03.

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SREEDHARA RAO v. SREENIVASA RAO.

The plaintiff preferred this Regular Appeal.

Mr. *C. Krishna Murti* for the appellant.

Mr. *S. Narayana Rao* for the respondent.

JUDGMENT—This was a suit for contribution. Assuming that plaintiff was entitled to recover from defendant proportionate share of cost of repairing the village tank, the question for decision is whether the suit is not barred by limitation. The cost of repair was paid by plaintiff to Government in June 1895, when the cause of action, if any, arose. The suit was filed in November 1902. Plaintiff contends that the contribution is a charge upon defendant's share of the village and that the suit is admissible being instituted within 12 years from 1895. He has, however, produced no authority to prove the alleged charge upon the estate. The Land Revenue Code empowers the Government to recover certain charges in the same manner in which arrear of land revenue may be recovered; but the provisions of the Code do not apply to a claim made by a private individual. In the absence of a rule of law or an agreement between the parties to sustain the claim, we must hold that the suit was not in time. We dismiss the appeal with costs.

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1904, February 26.

## APPELLATE CIVIL.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge, and Mr. Justice H. V. Nanjundayya.*

SREE LAKSHMI NARAYANASWAMI COMPANY, LIMITED,

BY AGENT PUTTU SUBRAYA SHETTY,

APPELLANT, (1ST DEFENDANT).

v.

CHIKA DEVARAJ URS, RESPONDENT, (PLAINTIFF).*

*Hypothecation bond—Hypothecatee borrowing money by pledging it—Right of pawnee or his assignee to proceed against hypothecated property.*

Defendants Nos. 3 and 4 borrowed Rs. 6,000 from defendant No. 1 on the security of some immoveable property. The latter in his turn borrowed a

* Regular Appeal No. 176 of 1901-02 against the decree of the Sub Judge of Mysore, in Original Suit No. 24 of 1900-01.

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similar sum from defendant No. 2 and pledged the hypothecation bond executed in his favour by defendants Nos. 3 and 4 and also another bond executed by defendants Nos. 5 to 7. The defendant No 2 assigned the first bond over to plaintiff who sued for the recovery of the money from defendant No. 1 and from the sale of the hypothecated property. The Sub Judge granted a decree as prayed for by plaintiff. In appeal, it was contended that the decree as regards the hypothecated property was not valid.

*Held*, that as defendant No. 2 was simply a creditor of defendant No. 1 and got possession of the bond as a security for the repayment of the loan, his assignee (the plaintiff) was entitled to realize his debt by selling the securities but had no direct claim against the debtors of defendant No. 1.

SUIT on a hypothecation bond. The Sub Judge passed a decree in terms of the reliefs claimed in the plaint.

The 1st defendant preferred this Regular Appeal.

Messrs. *L. Sreenivasa Iyengar and C. S. Doraswami Iyer* for the appellant.

Mr. *S. N. Ramaswami Iyengar* for the respondent.

JUDGMENT—The facts of the case are as follows:—Third and fourth defendants borrowed Rs. 6,000 from the first defendant upon the security of certain immovable property. Fifth, sixth and seventh defendants also borrowed Rs. 3,000 from first defendant upon the security of their houses. First defendant borrowed Rs. 6,000 from second defendant and pledged the two hypothecation bonds which had been executed to him by the above mentioned debtors (exhibit A). The second defendant assigned the bond A to plaintiff who sued for the principal and interest due thereunder. The Subordinate Judge of Mysore made a decree "that the plaintiff do recover from the assets of first defendant's Bank and the hypothecated properties of the plaint schedule the sum of Rs. 8,697 with interest," &c.

The first defendant has appealed from the decree. The third ground of appeal is that "the plaintiff has no right for a decree against the hypothecated property and ought to have prayed only for a decree to sell the right, title and interest of the mortgage bond executed by the appellant." We are of opinion that the plaintiff is not entitled to sue for the sale of the property which had been hypothecated to first defendant by defendants 3 to 7. Second defendant, whose assignee is the present plaintiff, was not transferee of the bonds which had been executed to first defendant

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by defendants 3 to 7; he was simply a creditor of the first defendant and got possession of the bonds only as security for repayment of his loan. He is entitled to realize his debt by selling the securities but has no direct claim against 1st defendant's debtors. A person who buys the securities in a Court sale will acquire the rights of the Bank to sue the debtors for moneys due upon their bonds. In modification of the Sub Judge's decree, we direct that the plaintiff be entitled to realize the Judgment debt by sale of the bonds which had been pledged to second defendant under exhibit A.

Enhanced interest at 18 per cent. per annum has been decreed from the date of default. We do not think that it is so excessive as to call for our interference. Each party has partially succeeded and each will bear his costs of the appeal.

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1904. March 7.

## APPELLATE CIVIL.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

M. NARASIMIAH, APPELLANT, (DEFENDANT).

*v.*

D. NARASINGA RAO, RESPONDENT, (PLAINTIFF).*

*Appeal—Withdrawal of suit—Appeal from order permitting unconditional withdrawal—Decree—Civil Procedure Code, sections 2, 220, 373, & 588—Costs.*

In a suit for damages for defamation, the plaintiff applied for its withdrawal without permission to file a fresh suit and the Sub Judge granted the prayer and ordered the plaintiff to pay only a portion of the costs which the defendant had incurred. In appeal by the latter, against the order relating to costs, it was contended that no appeal lay in such a case.

*Held*, that an order for the withdrawal of a suit without permission to file a fresh suit like an order rejecting a plaint came within the definition of a decree and was therefore appealable.

*Held further*, that the order as to costs was not sustainable as the expression "considering all the circumstances of the case" used by the Sub Judge was not acceptable as a reason within the meaning of section 220 of the Civil Procedure Code.

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* Regular Appeal No. 235 of 1901-02 against the order of the Sub Judge of Mysore in Original Suit No. 21 of 1901-02.

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1904.

M. NARASIMIAH v. D. NARASINGA RAO.

SUIT for damages. The Sub Judge permitted the plaintiff to withdraw the suit unconditionally and ordered him to pay only a portion of the costs incurred by the defendant.

The defendant preferred this Regular Appeal.

Mr. *C. Krishna Murti* for the appellant.

Messrs. *B. Nanjundappa* and *S. Ranganna* for the respondent.

JUDGMENT—The suit was for damages for defamation. It was partly tried when the plaintiff applied for its withdrawal without permission to file a fresh suit. The Subordinate Judge of Mysore granted the petition and ordered the plaintiff to pay only a fraction of the costs which had been incurred by defendant. The latter has appealed from the order and contends that full costs ought to have been decreed to him.

The first question which we have to decide is, whether an appeal lies in this case. The Judgments which are reported in I. L. R. 18 C. 322, 27 C. 362, and 21 M. 421, are authorities for the proposition that an appeal does not lie from an order for the withdrawal of a suit with permission to file a fresh suit. They do not apply to the order before us, inasmuch as permission to file a fresh suit was not sought by plaintiff and granted by the Lower Court. The plaintiff having chosen to withdraw the suit without such permission, he is precluded from bringing a fresh suit, and consequently the Subordinate Judge ought to have made an order, dismissing the suit. An order of this kind like an order rejecting a plaint comes within the definition of a decree, and is appealable.

The order as to costs is not sustainable. As a general rule, costs follow the event, and if a Court departs from it, section 220 of the Code requires it "to state its reasons in writing." The Judge has stated no reason, for we refuse to accept the expression, "considering all the circumstances of the case" as a reason; and upon perusing the record, we find no special reason for not awarding all the costs of the defendant. We set aside the order and direct plaintiff to pay defendant's costs of the suit and the appeal.

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1904.
March 26.

## APPELLATE CIVIL.

*Before Mr. Justice A. Rangaswami Iyengar, and Mr. Justice H. V. Nanjundayya.*

MALLARI, MINOR, BY GUARDIAN,

ANANDA THIRTHA RAO, APPELLANT, (PLAINTIFF).

*v.*

VENKATAPPA AND 2 OTHERS, RESPONDENTS, (DEFENDANTS).

*Minors' Rules of 1872—Suit by guardian—Order of appointment not properly stamped—Dismissal of suit on that ground—Appeal—Court Fees Regulation III of 1900, schedule I, art. 9.*

A suit brought by a guardian on behalf of a minor was dismissed on the ground that the plaintiff had not obtained a properly stamped certificate. On appeal, it was

*Held*, that the Minors' Rules did not make it imperative that the order of public commission or any document should be produced in evidence before the manager could be admitted to sue, and all that the Court could require was proof of appointment which could be furnished by the copy of the order filed in this case and therefore the Munsiff's decision was liable to be reversed.

SUIT by guardian on behalf of a minor. The Principal Munsiff of Bangalore dismissed the suit.

The plaintiff preferred this Regular Appeal.

Mr. *B. Subbanna* for the appellant.

Mr. *C. V. Narasimha Iyengar* for the respondents.

JUDGMENT—The appellant was nominated, under the Minors' Rules, Manager to the estate of a minor named Mylari and he instituted this suit for the recovery of money due under a bond belonging to the estate. The Munsiff dismissed the suit, on the ground that the appellant had not obtained a properly stamped certificate from the Sub Judge. The question is whether this order of the Munsiff is correct.

2. The Minors' Rules of 1872 are still in force in the State. Para. 3 provides for a person claiming a right to charge of a minor's property applying for "a certificate of administration." Rule 4 states that any relative of the minor or the Amildar of the Taluq in

* Regular Appeal No. 240 of 1903-04, against the decree of the Principal Munsiff of Bangalore in Original Suit No. 93 of 1903-04.

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MALLARI v. VENKATAPPA.

which minor's property is situated may apply to the Civil Court to appoint a fit person to take charge of the property of the minor. Section 7 directs that the Court shall, after enquiry, pass suitable order regarding the "*administration and management*" of the minor's estate. Rule 9 states that persons appointed to "manage" the property shall execute an obligation and Rule 10 provides that managers on executing such obligation shall be furnished with "*public commissions of management* under the seal and signature of the Court." Rule 12 directs that "any manager who shall have been appointed under these Rules shall be admitted by the Courts to prosecute or defend the minor's rights in all suits, &c." and Rule 17 provides that "The Court, for any sufficient reason, may recall any certificate granted to any manager, &c." These provisions have been referred to in detail as it is necessary to construe article 9, schedule I of the Court Fees Regulation III of 1900. Before proceeding to discuss this article, it is desirable to trace the origin of this provision.

3. The Court Fees Act VII of 1870 was in force in the State before Regulation III of 1890 was passed. It contained no provision requiring a special stamp for order under the Minors' Rules. It is mentioned in the statements of objects and reasons for the Regulation III of 1890 that "section 19 H as originally inserted by Act VIII of 1875 was subsequently repeated by the Guardian and Wards Act VIII of 1890 which contains no provision for the grant of certificate of administration in respect of the estate of minors. But as our Guardianship Rules of 1872 do contain such a provision, the repeated section has now been restored as section 19 L. The same remark applies with regard to article 10 of schedule I" (*i. e.* article 9 as finally passed).

4. Article 10 of the Court Fees Act as it was in force before it was cancelled applied to "certificates of administration" granted under Act XL of 1858 (applicable to Minors in Bengal) and under Act XX of 1864 (in force in Bombay). The former Act refers throughout to "certificate of administration" to be granted or revoked. It does not contain any provision corresponding to that of section 12 of our Rules requiring Courts to admit manager to prosecute suits, &c., on behalf of the minor's estate.

5. Now in dealing with the present appeal, two points deserve consideration. First, whether there is any document in the Mysore



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Rules which comes under article 9 of the new Court Fees Regulation. Second, whether the Munsiff was justified in dismissing the suit, because the manager (appellant) had failed to produce such a stamped document. From what had been detailed in para. 2, it will be seen that the drafting of the Rules has been rather loose. Important terms have not been preserved throughout, but equivalent expressions have been substituted for them in different sections. From an examination of the Rules as a whole, there can be no doubt that the words "public commissions" in Rule 9 would correspond to "certificate of administration" contained in article 9 of the Court Fees Regulation. But would a Court of Law be justified in refusing to admit an order of public commission or order appointing a person as manager in evidence, because it does not bear the stamp prescribed in article 9 of the Court Fees Regulation for a certificate of administration. As the provisions of such Regulations have to be strictly construed, it is doubtful if this article 9 can be enforced. But it does not appear necessary to decide this question in this case.

6. Section 12 provides that "any manager who shall have been appointed under these Rules shall be admitted by the Courts to prosecute or defend the minors' right in all suits, &c." The rules do not make it imperative that the order of public commission or any other document should be produced in evidence before the manager can be admitted to sue. All that the Court can require is proof of the appointment which can be furnished by the copy of the order A filed in this case. This interpretation receives strength from an examination of the language employed by the heirship certificate Act 27 of 1860, section 2 and Succession Regulation VII of 1901, section 4—both of which make production of a cetificate under the Act indispensable. On this question also it may be observed that though this section may be considered to take it for granted that a "public commission" has been issued, a strict rendering of the provisions cannot be held to make it indispensable to admit a manager to sue. It may be that the Government in the Revenue Department may insist upon the manager paying the stamp duty under article 9 either on the order of the Court appointing the manager or the public commission referred to in Rule 10. But a consideration of this question does not arise in this case in the view taken of Rule 12. It may be observed in this connection that article 9 of the Court Fees Regulation is proposed to be repealed in the draft Regulation for consolidating the law relating to Guardian

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and Ward published with Notification No. 76 Legis. 10-03 dated 21st December 1903. 1904.

MALLARI v. VENKATAPPA.

7. For these reasons, the decision of the Munsiff under appeal is reversed and the case is remanded for disposal. Costs of this appeal will abide and follow the result. The appeal stamp will be refunded.

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## APPELLATE CIVIL.

1904. June 28.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge and Mr. Justice H. V. Nanjundayya.*

LEMAJI MYLARAPPA, APPELLANT, (1ST DEFENDANT).

*v.*

N. SIDDOJI RAO AND ANOTHER, RESPONDENTS, (PLAINTIFF AND 2ND DEFENDANT).*

*Hindu Law—Joint family—Purchaser of an undivided member's share in family property—Court sale—Rights of such purchaser—Partial partition of family property, suit for—Maintainability—Form of suit and decree in such a case.*

The plaintiff purchased the share of a member of an undivided Hindu family in a house at a sale held in execution of a decree against him. He subsequently brought a suit for partition and delivery of possession of one-half of the house purchased by him after determining the judgment-debtor's share in the properties mentioned in the plaint schedule. It was contended by the defendants that the plaintiff's suit was not maintainable as it did not include all the properties which the family possessed.

*Held*, that the alienability of an interest in the joint family property had long been taken for granted in the State, and that it was too late now to question its propriety and therefore that the contention that the suit was not maintainable had not been made out.

*Held further*, that it was unnecessary to apply to an auction-purchaser of family property the prohibition against seeking partial partition, as he was neither interested nor quite in a favourable position to discover all the items of family property in cases in which the real co-parceners were either indifferent about affecting or unwilling to effect a final partition among themselves.

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* Regular Appeal No. 207 of 1901-02, against the decree of the District Judge of Shimoga, in Original Suit No. 9 of 1900-01.

1904.

LEMAJI MYLARAPPA v. N. SIDDOJI RAO.

SUIT for partition. The plaintiff who became the purchaser of a share in a house which belonged to a joint Hindu family sued two persons for partition and delivery to him of a moiety of the said house. The District Judge passed a decree accordingly.

The 1st defendant preferred this Regular Appeal.

Mr. *B. Nanjundappa* for the appellant.

Messrs. *C. Krishna Murti* and *M. B. Varadaraja Iyengar* for the respondents.

JUDGMENT—In execution of a decree obtained against the 2nd defendant, one of two undivided brothers, the plaintiff brought to sale and purchased his share in a house which was part of the joint estate. In the present suit, the plaintiff prayed that this brother's share in the whole of the family property should be ascertained and that, out of it, half of the house which the plaintiff had purchased should be delivered over to his (plaintiff's) possession. The District Judge has passed a decree, declaring that the 2nd defendant is entitled to one-half of the family property (which includes the house in dispute), and directing that the house be divided, and one-half of it given over to the possession of the plaintiff.

The 1st defendant has preferred an appeal and urged the same objections as he put forward in his written statement before the Lower Court. The learned Judge has disposed of the plea of collusion in the matter of the debt against the defendants, each of whom in fact charged the plaintiff with colluding with the other. The plaintiff happens to be a divided brother of the defendants; and no reason has been shown to justify our differing from the finding of the Lower Court in this matter.

The case is not one of voluntary alienation by the 2nd defendant, whose interest in undivided property was seized and sold in execution. The suit for partition and delivery is instituted during his life time; and it is settled law according to all the schools in British India that such an alienation is valid, and that a suit as in this case is maintainable (*Suraj Bunsi Koer* v. *Sheo Persad Singh* I. L. R. 5 Calcutta 148, *Ayyagiri Venkataramayya* v. *A. Ramayya* I. L. R. 25 Madras 690). We are not aware of any direct authority of this Court concerning the alienability of an interest in joint family property. No doubt, such a right of alienation is inconsistent with the rule of survivorship (*see* I. L. R. 25 Madras at p.

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713; I. L. R. 5 Calcutta at p. 166). But we think that the alienability of such interest has long been taken for granted in this State, and it is too late now to question its propriety. We hold that the appellant has failed to make good his contention that the suit is not maintainable.

The remaining objections refer to the manner in which the property liable to partition and its value have been determined by the Lower Court. It will simplify matters if the general question of the form of the suit and decree in such a case is first considered. The District Judge has relied on two cases of the Madras High Court to hold that the purchaser is bound to sue for partition of the whole of the property of the family of which a co-parcener's interest has been acquired by him. In the case of *Venkatarama* v. *Meera Labai* (I. L. R. 13 Madras 275) it is laid down that the principle, that a suit for a partial partition of undivided family property will not lie, has been firmly established by decisions. If its application is restricted to the members of the joint family, the principle is unexceptionable, and in fact absolutely necessary to enable the Courts to arrive at a final and equitable determination of the matters in dispute. But where strangers like the plaintiff in this case have acquired a partial though undefined interest in the family property, we are not prepared to subscribe to this general proposition without qualifications. We are not aware of any direct authority for prohibiting the stranger from seeking to realize the interest that has been acquired by him—except these cases of the Madras High Court. In fact, the later case (*Krishnaya* v. *Narasimham* I. L. R. 23 Madras 608) of the same Court furnishes an exception to the application of the general principle, inasmuch as it allowed partition of part of the property only, when it was shown that the remaining part was in the possession of a mortgagee at the time. With reference to the latter case, we confess that we are unable to see why the circumstance therein mentioned should make it an exception, for if the house could not be actually divided, the equity of redemption might have been included as property liable to partition. This however is beside the question; and if, on this ground, one exception is admissible, we see no reason why other exceptions should not be brought in on adequate grounds.

The share of a co-parcener in joint family property is not, as observed by the Judicial Committee of the Privy Council, 'properly the subject of direct seizure in execution, but rather by process

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direct against the owner of it.' (14 M. I. A. p. 50). The purchaser after acquiring the interest of the co-parcener in this manner, has to proceed to realize it by a suit to which all the co-parceners are made parties; but here a distinction has to be observed. The stranger may have acquired all the rights of the co-parcener, or, as in this case, he may have become the purchaser of the member's share in a particular item of the joint property. In the former case, a general partition is indispensable: but in the latter, it is unnecessary to determine the total extent and value of the family property except in an incidental manner. As observed by the Bombay High Court,* we see no reason why, when a purchaser wants to have the share in a family estate that he has bought divided off and given to him, the members of the family should be forced into a partition of the whole family estate (*Murar Rao* v. *Sitaram* I. L. R. 23 Bom. at p. 187).

* I. L. R. 22 Bom.

Of course, the purchaser cannot sue for a specific share of a particular item only without any reference to the remaining family property. The manner in which the right of such a purchaser can be ascertained and enforced is clearly laid down in *Pandurang Ananda Rao* v. *Basker Sadasiv* (10 B. H. C. R. 72), and in the judgment of Sir Bhashyam Iyengar in *Ayyagiri Venkataramayya* v. *A. Ramayya* (25 I. L. R. Madras, 690). We agree with the principles enunciated therein, and hold that though the purchaser who can only obtain the rights of his transferer can have no right strictly to claim a share in a particular item, still, as a matter of equity, the Court should, unless there are insuperable objections, so adjust the different shares as to give him what has been actually conveyed to him as being the share of the particular co-parcener. Such a suit, as observed by Sir B. Iyengar, is not a suit for partition in the technical sense, which can only take place between those who are members of the same undivided family. The purchaser does not become a co-parcener along with others, but becomes only a sort of tenant in common (*Gurulingappa* v. *Nandappa*—21, I. L. R. B., at p. 805). It seems unnecessary to apply to him the prohibition against seeking partial partition, as he is neither interested nor quite in a favourable position to discover all the different items of family property, in cases in which the real co-parceners are either indifferent about effecting or unwilling to effect a final partition among themselves.

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This rule of prohibition is discussed and laid down in its strictness in the Madras case of *Venkatarama* v. *Meera Labhai.* No doubt, the transferee can take no higher right than his vendor possesses; but that only refers to the substance of the claim, and does not necessitate the application of all the rules of procedure about the framing of the suit. We think that the purchaser does all that he need do if he makes all the co-parceners parties, and gives them a chance of arriving at a final partition or showing that the particular property acquired by him cannot be allotted as the share of the member whose interest he has purchased (see *Murar Rao* v. *Sitaram* I. L. R. 23, Bombay 181).

The plaintiff has, however, complied with the strict provision laid down in the Madras Cases. The pleas set up by the defendants show that neither of them seriously wanted a partition to take place in respect of the whole of the family property. The Lower Court has passed a decree awarding the 2nd defendant's half share in the house to the plaintiff, and declaring that the 2nd defendant is entitled to certain property as the remainder of his share. The appellant (1st defendant) objects also to the latter part of the decree, on the ground that the value of the share has not been properly computed. The whole evidence recorded in the case clearly establishes that the 2nd defendant's share can fairly and equitably be made to include half of the house which the plaintiff seeks to obtain in this suit. The declaration about the share due to the 2nd defendant is, in our opinion, only incidental. We think it unnecessary now to decide whether or not this would be conclusive of the matter in a suit that may be instituted by either of the defendants against the other, for effecting a partition or for recovering his share. We see no reason at present to say that the finding is incorrect; but as it seems to be unnecessary for the purpose of deciding the plaintiff's claim, we direct that the declaration be left out of the decree, which will accordingly be modified so as to award only what is due to the plaintiff, in accordance with the last paragraph of the judgment passed by the Lower Court.

The appellant will pay the 1st (plaintiff) respondent's costs.

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1904.
February 17.

## APPELLATE CIVIL.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

VENKATA SUBBA SETTY, Appellant, (Counter-Petitioner).

*v.*

VENKATA SETTY, Respondent, (Petitioner).*

*Indian Limitation Act, sections 173A & 177A—Adjustment of decree out of Court—Enquiry into the truth thereof—Judgment-debtor's application therefor within one year from the date of adjustment—Section applicable to such a case.*

The Judgment-debtor's application to equire into the truth of the adjustment, was made within one year from the date of such adjustment and consequently was not barred under article 177A of the Limitation Act.

Article 173A of the Regulation does not apply, because the time begins to run under that clause from the date of service of a notice in execution upon the applicant, and, in this case such a notice does not appear to have been served on him.

Execution application. The decree-holder, after having agreed to receive a portion of the decree amount in full satisfaction of the decree, again applied to execute the decree for the balance. The Munsiff dismissed the application and this was confirmed on appeal by the District Judge.

The decree-holder preferred this Miscellaneous Second Appeal.

Mr. *B. Tirum la Char* for the appellant.

Mr. *S. Narayana Rao* for the respondent.

Order—It has been concurrently found by the Lower Courts that, in pursuance of an agreement, made between the decree-holder and the judgment-debtor, the latter sold his land to a third person, who paid Rs. 100 out of the purchase money to the decree-holder aud that the remainder of the debt about Rs. 40 odd was excused. We are of opinion that this was an adjustment made to the satisfaction of the decree-holder. The judgment-debtor's application to enquire into the truth of the adjustment, was made within one year from the date of such adjustment, and consequently was not barred under article 177A of the Limitation Act. Article 173A of the Regulation does not apply, because the time begins to run under that clause from the date of service of a notice in execution upon the applicant and in this case, such notice does not appear to have been served upon him. We dismiss the appeal with costs.

* Miscellaneous Second Appeal No. 1 of 1903-04, against the order of the Sub Judge of Mysore, in Miscellaneous Appeal No. 2 of 1903-04, confirming the order of the Munsiff of Nanjangud in Miscellaneous Case 280 of 1902-03.

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## APPELLATE CIVIL.

1904.
January 18.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

MUNIRAMAIYA, APPELLANT.

*v.*

SHAMANNA AND ANOTHER, RESPONDENTS, (SURETIES).*

*Civil Procedure Code, sections 258, 336, 337A, 549 and 610—Execution of Decree—Surety under section 337A for payment of decree debt—Decree-holder—Remedy—Separate suit.*

It would seem from the omission of the Legislature to make an enactment against a surety under section 337A of the Civil Procedure Code that the liability is enforceable by a suit and not by a summary remedy.

*Balaji* v. *Ramasami, I. L. R.*, 7 *Madras*, 284; and *Arunachellam* v. *Arunachellam, I. L. R.*, 15 *Madras*, 203, *followed*;

*Venkapa Naik* v. *Baslingapa, bin Kotra Basapa, I. L. R.*, 12 *Bombay*, 411; *Thirumalai* v. *Ramayyar, I. L. R.*, 13 *Madras*, 1; and *Subjoo Das* v. *Balmakund Das, I. L. R.*, 23 *Calcutta*, 212, *referred to.*

EXECUTION APPLICATION. In execution of a decree against three persons, the decree-holder got two of them arrested and brought before the Court. They were released on their furnishing security for payment of the decree-debt. The decree-holder thereupon applied for execution of the decree against the surety but it was refused by the Munsiff.

The decree-holder preferred this Miscellaneous Appeal against the order of refusal.

Mr. *C. V. Narasimha Iyengar* for the appellant.

Mr. *C. Krishna Murti* for the respondents.

ORDER—The appellant obtained a decree against three persons and in execution thereof got two of them arrested and brought before the Lower Court. They represented to the Judge that they should not be committed to the Jail, that they were possessed of immoveable property of considerable value which they were not able

* Miscellaneous Appeal No. 18 of 1903-04 against the order of the Principal Munsiff of Bangalore in Execution Case No. 2183 of 1903-04.



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to sell for a fair price owing to the prevalence of the plague and that, if they were granted two months, they would be able to satisfy the decree. The appellant opposed the application. But the Court overruled his objection and released the debtors upon their furnishing security for payment of the decree-debt. (Execution Petition No. 664 of 1899-00).

The appellant prayed for execution of the decree against the surety. The latter paid Rs. 480 into Court and applied for time within which he promised to pay the remainder. When the appellant made a second application for execution, the Judge dismissed it upon the ground that the Code of Civil Procedure does not provide for the realization of the security in execution of the decree.

The question for decision is, whether the appellant is entitled to execute the decree against the surety who furnished security under section 337A of the Procedure Code. We observe that it is only in certain cases and for certain purposes a decree-holder is entitled to execute his decree against a surety. Whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable (section 253). Under section 336 "the Court may direct the security to be realized in execution of the decree." Under section 549, the costs may be recovered from a surety as if he were a party to the appeal—*see* also section 610 of the Code which is in force in British India which makes a surety liable only "in so far as the order awards costs to the respondent." It would seem from the omission of the Legislature to make a similar enactment against a surety under section 337A that the liability is enforceable by a suit and not by summary remedy.

This view is in accordance with two decisions of the Madras High Court. In one case when a party applied for review of judgment of an Appellate Court, he prayed for stay of execution of the decree and the prayer was granted upon furnishing security. The petition for review was rejected. Thereupon the decree-holder sought to execute his decree against the surety. Turner, C. J. and Hutchins, J. were of opinion that the petition was not maintainable—I. L. R. 7 M. 284. In the second case, the report shows that

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security was furnished for mesne profits and costs when an appeal was made to the Privy Council. When the decree-holder applied for execution against the surety, Muthusamy Iyer and Wilkinson, JJ., decided that, under section 610, costs could be recovered in execution and that "the order of the Subordinate Judge is right so far as it refused the appellant's application to proceed against the sureties in execution in respect of their liability for mesne profits." I. L. R. 15 M. 203.

The appellant's Advocate pressed upon us the decisions which are reported in I. L. R. Bom. 411 and I. L. R. 13 M. 1. The question for decision in each of these cases was whether section 253 was made applicable to decrees of Appellate Courts by section 583 of the Code so as to render a surety under section 546 liable to proceedings in execution. The two High Courts determined the question against the surety and the judgments were not followed by the High Court of Calcutta—*see* I. L. R. 23 C. 212. It is manifest from these judgments that there is room for difference of opinion as to the question whether a surety who undertakes to perform the decree of the Appellate Court is a surety "before the passing of a decree in an original suit." But they are not pertinent to the case before us in which security was furnished after the passing of the decree and during its execution.

It may be that there is no particular reason for making a distinction between the liability of a surety under section 336 and one under section 337A. But it is obvious that it is for the Legislature to supply the omission, if any, and that it is not open to us to import into the section the provision which is contained in another section.

It is also obvious that the question for decision being one of jurisdiction, the Munsiff was not estopped from discussing it notwithstanding that the surety did not raise the point.

It was argued for the respondent that the bond which he executed is not one which is within the purview of section 337A. The question need not be considered at this stage since we have decided that the bond is not enforcible in execution of the decree.

We dismiss the appeal with costs.

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1904.
January 18.

# APPELLATE CIVIL.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

SIDDABASAPPA, APPELLANT, (3rd DEFENDANT).

*v.*

ERRA GUNTAPPA, RESPONDENT, (DECREE-HOLDER).*

*Hypothecation of several properties—Decree against some—Execution—Objection by Judgment-debtor before executing Court—Untenable.*

In a suit on a hypothecation bond, the plaintiff omitted to claim relief against a house which was also included in the bond and a decree was passed as prayed for. In execution of the decree, one of the judgment-debtors contended that the decree-holder should first proceed against the house referred to in the suit bond though it was not included in the plaint schedule. The Munsiff declined to go behind the decree and disallowed the objection. The Judgment-debtor preferred this Miscellaneous Appeal.

*Held*, that the Order of the Munsiff was correct.

*Ram Dhun Dhur* v. *Mohesh Chunder Chowdhry I. L. R.*, 9 *Calcutta p.* 403; *and Moro Raghunath* v. *Balaji Trimbak, I. L. R.*, 13 *Bombay* 45, *distinguished.*

Messrs. *B. Nanjundappa* and *S. Ranganna* for the appellant.

Messrs. *L. Sreenivasa Iyengar* and *C. S. Doraswami Iyer* for the respondent.

ORDER—The learned Advocate for the appellant quoted 9 Cal. 406 and 13, B. 45 in support of his appeal. But the two cases are distinguishable from the present. In this case 4 pieces of wet land and one house were mortgaged. When the plaintiff sued for the mortgage amount he stated in his plaint that the house had been sold and part of the sale proceeds credited to the mortgage debt and claimed to recover the amount from the mortgaged lands. The appellant was the contesting defendant and he did not object to the plaintiff having left the house out of his claim; so, as against the present respondent, who is the said plaintiff, he cannot put forward the same contention now.

* Miscellaneous Appeal No. 14 of 1903-04, against the order of the Munsiff of Maddagiri in Execution Case No. 14 of 1903-04.

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It is further argued that the direction of this Court in R. A. 111 of 1899-00 has the effect of making the house in question also liable to the mortgage decree. The Judgment held that "The appellant has, however, good reason to complain of the decree in so far as it makes the debt a charge on the hypothecated properties purchased by 3rd defendant when other properties are also included in C (deed of mortgage). The words 'purchased by 3rd defendant' will therefore be excluded." This direction does not amount to an order that the house should be expressly made liable to the amount sued for in that decree. There is nothing to shew who purchased the house and under what circumstances. This Court cannot make the house liable even if it thought it desirable, in the absence of the persons interested in the house. Moreover, as a matter of fact, the house is not mentioned in the decree. The removal of the words referred to appears to have been ordered with a view to give the appellant an opportunity to obtain any contribution which he may be entitled to on account of the house towards the mortgage debt which he may pay. But this cannot entitle him to have the contribution due for the house towards the respondent's decree under execution ascertained in the course of execution proceedings and deducted from the decree amount before the lands can be sold. The purchaser of the house is not a party to the suit and cannot be a party to the execution proceedings under section 244 (*see* remarks at page 410, Cal. IX, with regard to the fact of all the interested parties being before Court).

For these reasons, the order of the Munsiff under appeal is correct and must be affirmed. This appeal is dismissed with costs.

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1904.
February 12.

# APPELLATE CIVIL.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

NARANAPPA AND ANOTHER, APPELLANTS, (PLAINTIFFS 3 AND 4).

v.

DAVANGERE VASAPPA AND 3 OTHERS, RESPONDENTS, (DEFENDANTS 1 TO 4)*.

*Limitation Act, schedule II, article 179, clause (2)—Suit against several—Appeal against one—Execution of decree—Limitation—Starting point.*

The plaintiff brought a suit for recovery of money due on a hypothecation bond against the executant, his sons and a widow who claimed maintenance from the hypothecated property. It was decreed against the executants and his sons and against the hypothecated property excepting a house over which the widow was declared to have a prior charge on account of her maintenance. The plaintiff appealed from the decree in so far as it upheld the widow's claim but did not make the other defendants parties to the appeal. The Appellate Court modified the decree of the Court of First Instance. The plaintiff applied for the execution of the decree against all the defendants within 3 years from the date of the appellate decree but after 3 years from the date of the decree of first Court and it was contended that the execution had become time-barred so far as regards the executants and his sons as they were no parties to the appeal. The Lower Court dismissed the petition. The plaintiff (decree-holder) preferred this Miscellaneous Appeal against the aforesaid order of dismissal.

*Held*, that following the Full Bench decisions of the High Courts of Madras and Calcutta, the period of limitation would run from the date of the Appellate decree and therefore the application was not barred.

*Gopal* v. *Gosaindas, I. L. R.* 25 *Cal.* 594; and *Kristnamma* v. *Mangammal, I. L. R.* 26 *Mad.* 91, *followed.*

*Mashiat-un-rissa* v. *Rani, I. L. R.* 13 *All.* 12, *dissented from.*

Messrs. *D. Venkataramayya* and *M. Ramachandra Rao* for the appellants.

Mr. *C. Sesha Char* for the 1st and 2nd respondents.

ORDER—This appeal arises out of an application for execution of a decree. The facts of the case are briefly these : The suit was

* Miscellaneous Appeal No. 35 of 1903—04 against the order of the District Judge of Shimoga in Execution Case No. 50 of 1902—03.

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for money due upon a hypothecation bond, which had been executed to plaintiff by first defendant. The mortgagor's sons were made defendants 2, 3 and 4 and a widow who was a member of the mortgagor's family and who claimed maintenance was included as 5th defendant. The suit was decreed against defendants 1—4 and against the mortgaged property, excepting a house, over which, the 5th defendant was declared to have a prior charge on account of her maintenance. The plaintiff appealed from the decree, in so far as it upheld the widow's claim and he did not make defendants 1—4 parties to his appeal. The Appellate Court modified the decree of the Court of First Instance, by disallowing the fifth defendant's claim. The plaintiff applied for execution of the decree within three years from the date of the decree of the Appellate Court but more than three years after the date of the decree of the first Court. The defendants 1—4 contended that, inasmuch as they were not parties to the appeal, and as the plaintiff could have executed the original decree against them, notwithstanding the pendency of the appeal against the 5th defendant, the application for execution was barred by limitation. The Lower Court dismissed the petition "since so far as they (defendants 1 - 4) were concerned, the decree was not at all, imperilled by reason of the appeal." It is from this order, that the decree-holder has appealed to us, on the ground that the learned District Judge did not rightly interpret clause 2 of article 179 of the Limitation Act.

There are many conflicting decisions on the question at issue. In the earlier judgments, which are reported in the Indian Law Reports, we observe that the test was applied whether or not, the whole decree was imperilled by the appeal. Edge, C. J., observed that it would be unreasonable "to extend the period of limitation as against persons who were in no way concerned with an appeal, and whose rights under a decree, could not be affected by an appeal to which, they were not parties, or whose liabilities under a decree, could neither be limited, or extended or varied by an appeal to which, they were not parties." (I. L. R. 13 A. p. 12) But this opinion has been dissented from, in recent decisions, because it is opposed to the plain grammatical interpretation of the section. (*See* Full Bench decisions of the High Courts of Calcutta and Madras, reported in C. 25 p. 594 and 26 M. p. 91). "The article makes no distinction between those cases in which the whole decree is appealed against, and these in which only a part of the decree is appealed

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against. If the Legislature thought such a distinction desirable, it would not have been difficult to find apt language, in which to give effect to the distinction, but for the Courts to do, what the Legislature has refrained from doing, would be to alter the law, and would introduce an unnecessary element of uncertainty into the execution of decrees. The grammatical meaning of the words is simple enough and should be given effect to. All periods of limitation are more or less arbitrary and it is of the highest importance that they should be laid down with clearness and certainty and that subtle distinctions, not warranted by the language of the Legislature, should not be introduced by the Courts." (Benson J., p. 94).

"All that clause (2) of the third column of article 179 provides is, that, if a question of limitation should arise as to the execution of a decree which has been appealed against, limitation is to be computed not from the date of the original decree but from that of the appellate decree, and as it will generally lead to confusion and in certain classes of cases even to anomalies if limitation is to be reckoned from different starting points in respect of the execution of different parts of the same decree, the Legislature has fixed without causing any hardship to either party, one and the same starting point." (Bhasyam Iyengar, J., 95).

Following the Full Bench decisions of the High Courts of Madras and Calcutta, we hold that the period of limitation runs from the date of the appellate decree and that the application is not barred. We reverse the order and remand the petition for disposal according to law. The costs of the appeal will abide the result.

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## APPELLATE CIVIL.

1904.
February 27.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge, and Mr. Justice H. V. Nanjundayya.*

CHIK MADDAYYA AND 2 OTHERS, MINORS BY GUARDIAN THIMMAMMA, APPELLANTS, (PETITIONERS 2 AND 4).

*v.*

VENKATARAMANAIYA AND ANOTHER, RESPONDENTS, (COUNTER-PETITIONERS).*

*Promissory notes executed by mother—Suit thereon against her and her minor sons—Exparte decree without personal service of summons on any—Application to set aside the decree—Guardian of minor defendants not formally appointed by Court— Civil Procedure Code, section 456.*

Two promissory notes were executed in favour of plaintiffs by one Thimmanna and a suit was filed on them by plaintiffs making her and her minor sons defendants in the case. In the plaint, the mother (executant) was described as the guardian of her minor sons. An exparte decree was passed, none of the defendants having been personally served. Afterwards the mother filed an application on behalf of her sons, alleging that they were not bound by the decree and also praying that the decree as regards them may be set aside. The Sub Judge dismissed the application. Thereupon, the mother on behalf of her sons, preferred this Miscellaneous Appeal.

*Held*, that as her interest and that of her sons could not be said to be identical in respect of the subject-matter and as no formal order was passed by the Court under section 456 of the Civil Procedure Code, constituting her a guardian *ad litem*, the exparte decree passed against the appellants was set aside.

Messrs. *D. Venkataramayya* and *M. Ramachandra Rao* for the appellants.

Messrs. *B. Nanjundappa* and *S. Ranganna* for the respondents.

ORDER—In O. S. No. 27 of 1899-1900, the Subordinate Judge of Mysore passed an *exparte* decree against the three minor petitioners, and their guardian who was also a co-defendant, and another (their brother) who was *sui juris* at the time. The plaint stated that the petitioners were minors, and named their mother as the guardian. No formal order was passsed by the Court under section 456 of the

* Miscellaneous Appeal No. 36 of 1903-04, against the order of the Sub Judge, Mysore, in Miscellaneous Case No. 177 of 1903-04.



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Civil Procedure Code, constituting her a guardian *ad litem.* The summons was not personally received by her: but it was reported that she saw the process-server but went away without receiving the summons from him.

2. The mother filed a petition before the Subordinate Judge to get this decree set aside as against the minor defendants, and failing in her attempt there, has filed this appeal against the order of that Court.

3. The suit was based on two pro-notes for Rs. 3,000 executed by the mother of the three minor appellants in favour of her daughter and daughter's husband (respondents), which were alleged to be binding on these minors. The mother does not deny execution of the pro-notes, and does not object to a decree being passed against herself. But she alleges that the pro-notes were executed by her in her own capacity and not on behalf of the minors. Her interest and that of the minors cannot therefore be said to be identical in respect of the subject matter. Even if she had appeared personally, the Court would have exercised a proper discretion in appointing some other person as the guardian of the minor defendants for the purpose of the suit. The consequence cannot well be otherwise, when she did not appear at all, and when even the fact of service on her is not quite satisfactorily established.

4. It was contended that the mother herself who was declared to have been duly served, and who admits her liability cannot be allowed to file this application on behalf of the minors. But as long as the minors have a valid claim to be heard, we cannot agree to the contention that their mother is precluded from placing their case before the Court.

5. The order of the Subordinate Judge is therefore reversed. The exparte decree passed against the appellants will be set aside; and the Lower Court will dispose of the suit on its merits, after appointing a proper guardian for the minors. The costs of these Miscellaneous Proceedings will follow the result of the regular suit.

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## APPELLATE CIVIL.

1904.
February 29.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

MAHABOOB OONNISA BEGAM BY HER AGENT HASSAN ALI, APPELLANT.

*v.*

SEENAPPA, RESPONDENT. *

*Land Revenue Code, sections 93 and 97—Survey settlement—Introduction into a Jodi village at the instance of a Jodidar—Enhancement of Revenue—Complaint to the Deputy Commissioner—Order refusing the relief prayed for—No appeal lies to the Chief Court.*

On the application of the Jodidar of Hommadevanahalli, Bangalore Taluk, Survey settlement was introduced into the village and the Jodi was raised. A tenant under the Jodidar complained to the Assistant Commissioner against the enhancement of Revenue, also alleging that there were several irregularities connected with the settlement. That Officer referred the petitioner to a regular suit. Thereupon, the tenant presented an appeal to the Deputy Commissioner who disposed of it under section 97 of the Land Revenue Code. Against this order, the tenant preferred this Miscellaneous Appeal to the Chief Court under section 96 of the Land Revenue Code.

*Held*, that in the present case no appeal lay to the Chief Court as the order did not come under section 97 of the Land Revenue Code and that if the appellant was aggrieved by the order, the remedy was apparently to petition the Government or to apply to the Deputy Commissioner for reconsideration or to file a formal suit under the provisions of section 88 or other sections in Chapter VII.

Mr. *B. Ramanna* for the appellant.

ORDER—In this appeal petition, the petitioner failed to state under what provision of the Land Revenue Regulation he preferred the appeal against the order of the Deputy Commissioner. The orders of the Deputy Commissioner and the Assistant Commissioner also do not contain any reference to the provisions of the Regulation. The appellant was directed to produce copies of his petition to the Assistant Commissioner and any other papers he may have relating to the said petition. He has filed copies of the petition presented by appellant on 26-11—1902 to Assistant Commissioner.

* Miscellaneous Appeal No. 30 of 1903—04, against the order of the Deputy Commissioner, Bangalore District, dated 16—6—1903.

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and of an endorsement by the Revenue Commissioner dated 20th October 1903.

From the petition it is gathered that the appellant holds lands in Jodi Hommadevanahalli, Bangalore Taluk. On the application of the Jodidar, Survey settlement was introduced under the provisions of section 236, Land Revenue Regulation. The grievances of appellant are that a land which was not fit for cultivation and had been held on Hulgaval tenure, had been assessed at dry rates, and that a portion of land included in his occupation had been excluded from his holding. The copy of the order of the Assistant Commissioner does not, however, appear to have been passed on this petition. It purports to have been passed on a petition from the Jodidar for the recovery of the amount due on the appellant's pattah and is to the effect that the Jodidar should file a regular suit, as he appeared to claim enhanced assessment.

The Deputy Commissioner held that the appellant did not appear when the settlement was introduced in the village, that the Jodidar had alleged in his petition that the appellant had received pattah and paid one year's assessment and that the Jodidar was therefore entitled to help asked for to realize the kandayam under the provisions of section 97.

Section 236 provides that the Government might authorize the extension of all or any of the provisions of chapter VIII to X of the Land Revenue Regulation, on the application of the owner of the alienated village. There is nothing to shew what provisions were so introduced in this case. It is also not clear whether the revised assessments are binding upon the appellant merely on announcement under section 113 or the Jodidar is bound to file a regular suit under section 88. It is also doubtful whether the appellant could proceed under the provisions of section 118 and whether, if so, her petition dated 26-11-1901 should have been accepted and disposed of as one under that section.

For the purposes of the present appeal, however, we are unable to go behind the allegations contained in the order of the Deputy Commissioner that the application of the Jodidar is only an application for help under section 97 of the Land Revenue Code, and that he was entitled to the grant of his request. There is no

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appeal to this Court under it, even if the contention of the appellant that no notice was given to her and that the Deputy Commissioner should not have passed an order under that section under the circumstances of this case, should be reasonable. If the appellant is aggrieved by the order, her remedy is apparently to petition the Government or to apply to the Deputy Commissioner for reconsideration, or to file a formal suit under the provisions of section 88 or other sections in chapter VII.



With these remarks, this Miscellaneous Appeal is rejected.

## APPELLATE CIVIL.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

1904. February 29.

NAGAMMA AND 4 OTHERS, APPELLANTS, (PLAINTIFFS).

*v.*

BHEEMA RAO AND 2 OTHERS, RESPONDENTS, (DEFENDANTS).*

*Concubine—Illegitimate children—Suit by all of them jointly against the heirs of a deceased Hindu—Maintenance—Misjoinder of parties and causes of action—Ground of action common to all plaintiffs.*

The concubine of a deceased Hindu and her children jointly sued the deceased's heirs for maintenance. It was contended by the latter that each plaintiff had a separate cause of action and that each should file a separate suit.

*Held*, that there was no valid objection to the institution of a single suit since the ground of action was common to all the plaintiffs, *viz.*, that they have a right to charge the deceased man's property in the hands of his successors with their maintenance.

SUIT for maintenance. The District Judge being of opinion that there was misjoinder of parties and causes of action, passed an order directing the plaintiffs to amend the plaint and afterwards dismissed the suit as the plaintiffs failed to do so.

The plaintiffs preferred this Miscellaneous Appeal.

Mr. *M. B. Varadaraja Iyengar* for the appellants.

Mr. *B. Nanjundappa* for the respondents.

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* Miscellaneous Appeal No. 28 of 1903—04, against the order of the District Judge, Shimoga, in Original Suit No. 2 of 1903—04.

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NAGAMMA v. BHEEMA RAO.

ORDER—This was a suit for maintenance. The plaint alleges that first plaintiff was the concubine of Krishna Rao, deceased, and that plaintiffs 2 to 5 were his illegitimate children. It is contended by them that they have a right to claim maintenance from defendants who have inherited the above mentioned Krishna Rao's property. The District Judge was of opinion that there was misjoinder of different causes of action and directed the plaintiffs to amend the plaint. It appears that, since the plaint was not amended, the District Judge rejected it subsequent to the institution of this appeal.

It may be urged that each plaintiff has a separate cause of action and that each should file a separate suit; but we see no valid objection to the institution of a single suit, since the ground of action is common to all plaintiffs; *viz.*, that they have a right to charge Krishna Rao's property in the hands of his successors with their maintenance. We set aside the order of the District Judge and direct him to restore the suit to his file and dispose of it according to law. The costs of this appeal will abide the result.

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1904. January 26.

## REVISIONAL CIVIL.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

THIMMAIYA, PETITIONER, (DEFENDANT).

*v.*

M. KASIM ABOO BAKER SAIT, COUNTER-PETITIONER, (PLAINTIFF).*

*Indian Evidence Act, sections 32 cl. (2) and 34—Account books—Corroborative evidence necessary to render defendant liable upon entries in plaintiff's books—Relevancy of such entries under section 32, I. E. Act—Legal evidence.*

The contention that entries in plaintiff's accounts are not by themselves sufficient to prove the items is sound and borne out by the case quoted at 18 Allahabad, 92.

The entries in the accounts are relevant not only under section 34, Indian Evidence Act, as entries in books of account regularly kept in the course of business but they may also be relevant under section 32, clause (2) as statements made by persons whose attendance could not be secured for

* Civil Revision Petition No. 71 of 1903—04, against the decision of the Principal Munsiff of Bangalore in Small Cause No. 109 of 1903—04.

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examination as witnesses without unreasonable delay and expense. In this view they serve as evidence capable of establishing the fact which they recorded.

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THIMMAIYA v. M. KASIM ABOO BAKER SAIT.

SUIT upon accounts. The plaintiff sued the defendant for the recovery of Rs. 35-10-3 due to him on accounts. The Munsiff passed a decree in favour of plaintiff.

The defendant preferred this Revision Petition.

Mr. *B. Nanjundappa* for the petitioner.

Mr. *M. Bheema Rao* for the counter-petitioner.

ORDER—The plaintiff is a wholesale dealer in cloths and the defendant a retail merchant. The plaintiff's case is that defendant had dealings with him from 7th July 1901 to 25th February 1903 and that the amount claimed was the balance due. The defendant denied that he had any dealings with plaintiff previous to 14th June 1902. The plaintiff swore that defendant had dealings before 14th April 1902 when he removed his shop from Doddapet to a building opposite the old Taluk Cutcherry and produced his account books. He deposed that the sales are made by himself or his brothers and that his accounts were written by his gumastah and sometimes by himself. He also admitted that he could not definitely state if he was present on all the occasions between 7th July 1901 and 20th May 1902 when defendant purchased goods in his shop. He has not been cross-examined on individual entries as to which purchases referred to therein were made in his presence. But it may be concluded as established that the defendant had dealings with the plaintiff's shop prior to June 1902 though denied by him.

It is argued by the learned Advocate for the defendant that there is no legal evidence of all the items of sale to the defendant and that it cannot therefore be held that any balance was due from defendant. He contends that, under section 34 of the Evidence Act, the entries in the plaintiff's account are not by themselves sufficient to prove the items and that plaintiff has admitted his inability to vouch for every one of them. So far his argument is sound and unimpeachable and borne out by the case quoted at 18 Allahabad, 92. But the entries in the accounts are relevant not only under section 34 as entries in books of account regularly kept in the course of business but they may also be relevant under section 32, clause 2 as statement made by persons whose attendance

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cannot be secured for examination as witnesses without unreasonable delay and expense. The plaintiff has sworn (and he has not been contradicted or cross-examined on the point) that all his gumastahs, who made the entries in these accounts, have returned to their country in the north of India and cannot be traced. It may be presumed with reason that, if these men were present, they would have been able to vouch for the actual sales on the making of the entries with the knowledge or consent of the defendant. In this view of the case, the entries serve as evidence capable of establishing the fact which they recorded. The plaintiff is evidently a large trader and his dealings extensive. His accounts (day book and ledger) contain transactions not only with defendant but with a large number of other customers.

We are therefore of opinion that there is sufficient legal evidence in support of the plaintiff's claim and that no good reason exists for interfering with the Munsiff's decision in revision.

This petition is dismissed with costs.

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1904. February 12.

## REVISIONAL CIVIL.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge.*

MAHANTHA DEVARU, PETITIONER, (PLAINTIFF).

v.

SIDDE GOWDA, COUNTER-PETITIONER, (DEFENDANT).*

*Civil Procedure Code, section 257A—Settlement of decree without sanction by taking a bond from a third party—Suit on bond—Not void under the section.*

*Held*, that following the decision of the Bombay High Court in 23 B., 502, section 257 A of the Code of Civil Procedure could not be applied where one of the parties to the agreement was not a party to the decree.

SUIT on a bond. The plaintiff had obtained a decree against two persons and in settlement of half the decree amount due by one of the Judgment-debtors, he accepted a bond from a third person (the present defendant). Subsequently he brought the present suit on the

* Civil Revision Petition No. 90 of 1902-03, against the decision of the Munsiff of Nanjungud in Small Cause No. 111 of 1902-03.

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bond and it was contended that the bond was void under section 257A of the Civil Procedure Code. The Munsiff upheld the contention and dismissed the plaintiff's suit.

The plaintiff preparod this Civil Revision Petition.

Mr. *B. Nanjundappa* for the petitioner.

ORDER—The plaintiff obtained a decree for Rs. 46-7-9 against two persons Madaiya and Channayya. The defendant in this suit executed a bond to plaintiff, promising to pay Rs. 23-4-0, Channayya's share of the debt, and in default of payment within 15 days, he agreed to pay interest thereon at two per cent. per mensem. The plaintiff sued for money due upon the bond. The defence was that the bond was void under section 257A. The Munsiff upheld the contention and dismissed the suit. The plaintiff has applied for revision.

There is a conflict of decisions on the question whether an agreement which offends against the provisions of section 257A of the Code of Civil Procedure is void altogether, or is void only in so far as it affects the execution of the decree. Some Judges hold that such an agreement is absolutely void. Other Judges limit the application of the section to proceedings in execution. The latest ruling on the question is contained in I. L. R. 22 B. p. 693. A Full Bench of the High Court of Bombay held that the prohibition made by the Legislature was absolute, and that it ought not to be explained away on the ground that the enactment was contained in the Procedure Code and in a chapter which related to the execution of decrees.

The Munsiff, who dismissed the suit, following the opinion of the Bombay High Court, omitted to notice that there was a material difference between the two suits. In the Bombay case, the agreement in dispute was made between the parties to the decree, but in the case before us the agreement was made between the decree-holder and a third person who was interested in one of the Judgment-debtors. The question for decision is, whether it is open to a person who is not a party to a decree to plead section 257A in bar of the suit. It has been decided by the Bombay High Court that the section cannot be applied, where one of the parties to the agreement is not a party to the decree. (I. L. R. 23 B. 502). It is this decision which the Munsiff ought to have followed.



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Since there is no legal objection to the maintainability of the suit on the bond, there is no need to discuss the larger question as to the interpretation of section 257A.

The record shows that the parties were at issue only on the question whether the bond was or was not enforceable. The decision being adverse to defendant, the decree of the Munsiff is reversed and the plaintiff is entitled to recover the amount sued for and further interest at six per cent per annum from date of suit until payment and the costs of the suit and this petition.

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1904. February 17.

## REVISIONAL CIVIL.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

CHIKKA MUNIYAPPA SETTI, PETITIONER,

v.

MUNI THIMMA, COUNTER-PETITIONER*.

*Sub Judge—Small cause decree passed by him—Munsiff subsequently invested with small cause jurisdiction—Applications for execution presented to the latter—Final application to execute presented to Sub Judge after three years from date of decree—Proper Court to continue execution proceedings.*

There is room for difference of opinion on the question whether the decree ought to be executed by the Subordinate Judge or by the Munsiff Until the question is decided by a Full Bench, the latest ruling by *Mr. Best, C. J.* and *Mr. Narahari Rao, J.* "that the Munsiff had jurisdiction to execute the decree" may be followed. (Miscellaneous Appeal No. 22 of 1901-02.)

EXECUTION APPLICATION. The Decree-holder applied to the Sub Judge of Bangalore for the execution of a decree passed by him more than three years prior to the date of the application. The Sub Judge dismissed it on the ground that it had become time-barred.

The decree-holder preferred this Civil Revision Petition.

Mr. *B. Subbanna* for the petitioner.

ORDER—The decree under execution is one made in a Small Cause Suit by the Subordinate Judge of Bangalore in August 1897.

* Civil Revision Petition No. 13 of 1902-03 against the order of the Sub Judge of Bangalore in Execution Case No. 464 of 1901-02.

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CHIKKA MUNIYAPPA SETTI v. MUNI THIMMA.

ıbsequently theMunsiff of Bangalore being invested with Small Cause risdiction, the decree-holder applied to the Munsiff for execution ithout getting the decree transferred to that Court. He made ree applications, one on 5th August 1898, one on 9th July 1901 ıd the last on 24th August 1901. He, then, of his own motion, plied to the Subordinate Judge in November 1901 to execute the ecree, who dismissed the petition upon the ground that it was barred y limitation.

There is room for difference of opinion on the question hether the decree ought to be executed by the Subordinate Judge by the Munsiff. Until the question is decided by a Full Bench, le latest ruling made by Best, C. J. and Narahari Row, J. may e followed. (Mis. Appeal No. 22 of 1901-02). They were of opinion hat the Munsiff had jurisdiction to execute the decree. The petiioner may continue proceedings in execution in the Munsiff's Court. Ve make no order as to costs.

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## REVISIONAL CIVIL.

1904. March 11.

*Before Mr. Justice A. Rangaswami Iyengar, and Mr. Justice H. V. Nanjundayya.*

HOOCHAYYA, MINOR, BY KIKKEERAMMA, PETITIONER, (CERTIFICATE HOLDER).

v.

LAKKANNA AND 2 OTHERS, COUNTER-PETITIONERS.*

*uccession Certificate Regulation VII of* 1901, *section* 9—*Court issuing certificate —Collections of debts due to the deceased person—Power to call upon sureties to render an account thereof.*

The holder of a succession certificate applied to the Court under section Regulation VII of 1901, to call upon his sureties to produce the amounts of ıoney which they had collected from the debtor of the deceased person and invest the same in the Savings Bank. The District Judge, being of opinion hat even if the allegation be true, he had no power to order the sureties to ay the amount into Court, dismissed the application. The applicant preferred Revision Petition to the Chief Court.

*Held*, that section 9 did not clearly apply to the present case and that here was apparently no general rule or law authorizing the Court which issued

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*Civil Revision Petition No. 81 of 1903-04, against the order of the District Judge of Mysore, in Miscellaneous Case No. 40 of 1903-04.

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1904.

HOOCHAYYA v. LKKANNA.

a certificate of heirship, to call upon the sureties to render an account of the collections which should be made by the person to whom the certificate was granted on their security.

Messrs. *L. Sreenivasa Iyengar* and *C. S. Dorasami Iyer* for the petitioner.

Mr. *S. Narayana Rao* for the counter-petitioners.

ORDER—Section 9 of the Regulation 7 of 1901 does not clearly apply to the present case. There is apparently no general rule or law authorizing the Court which issued a certificate of heirship, to call upon the sureties to render an account of the collections which should be made by the person to whom the certificate was granted on their security.

This petition is dismissed with costs.

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1904. March 14.

## REVISIONAL CIVIL.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

RAJAH DOD NANJAPPA, PETITIONER, (DECREE-HOLDER).

v.

CHENNABYRAPPA AND ANOTHER, COUNTER-PETITIONERS, (SURETIES).*

*Surety—Enforcement of security—Surety to produce attached property or to pay damages in default—Execution of decree—Separate Suit—Civil Procedure Code, sections* 253, 545, *&* 546*—Rules published under section 269, cl. (b) C. P. C. dated 12th October* 1899.

Two sureties had executed a bond undertaking to produce the attached property whenever required by Court and to pay damages out of their property in default. At the instance of the plaintiff (decree-holder), they were called upon to produce the property but failed. The plaintiff (decree-holder) applied to the Court to execute the decree against the sureties but the Munsiff refused. The plaintiff (decree-holder) has preferred this Revision Petition to the Chief Court.

*Held*, that the surety bond executed in this case did not come under any of the sections of the Civil Procedure Code and did not provide for the pay-

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*Civil Revision Petition No. 111 of 1902-03 against the order of the Munsiff of Dodballapur, in Execution Case No. 176 of 1902-03.

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ment of the decree amount or any portion of it or for the due execution of any definite order of the Court but only made the sureties liable in damages and therefore the liability of the sureties could only be enforced by a regular suit.

In the case reported at 22 Madras 268, it was held that the security should be enforced only by a regular suit, in spite of the fact that the security bond had been executed before the decree was passed in the original suit, on the ground that its terms did not bring it within the purview of section 253, Civil Procedure Code. It follows therefore that in the present case, the objection against enforcing the security in execution must be even stronger.

Messrs. *L. Sreenivasa Iyengar* and *C. S. Dorasami Iyer* for the petitioner.

Mr. *B. Nanjundappa* for the counter-petitioners.

Order—In this case the sureties executed a bond on 9th September 1901 undertaking to produce the attached property whenever required by Court and to pay damages out of their property in default. At the instance of the plaintiff, they were called upon to produce the property but failed. The plaintiff applied to the Court to execute the decree against the sureties but the Munsiff refused. The plaintiff has applied for a revision of this order.

The security was evidently taken under clause (*b*), section 5 of the Rules published on 12th October 1899 under para. 3 of section 269, Civil Procedure Code. It provides that the attaching Officer may leave attached property in charge of a person in the village where it was attached provided he enters into a bond with one or more sufficient sureties for its production when called for.

Even as regards the action to be taken against a surety under sections 545 and 546, Civil Procedure Code, the several High Courts are divided in opinion. The security bond executed in this case does not come under any of the sections of the Civil Procedure Code and does not provide for the payment of the decree amount or any portion of it or for the due execution of any definite order of a Court. It only makes the sureties liable in damages. The liability of the sureties could be enforced against them in the original suit only in accordance with a special statutory direction on the subject. The special direction contained in it for proceeding in execution in the case of some securities only, goes to shew that the liability can only be enforced under the ordinary principles of law by a regular suit in the case of others. The case reported at 22 M. 268 serves as a

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1904.

RAJAH DOD NANJAPPA v. CHENNA-BYRAPPA.

precedent in support of this view. In that case some bonds produced by the defendant in the course of the trial of a suit for partition were ordered to be returned on production of a security that the bonds shall be produced when required or their value paid in default. It was held that the security should be enforced only by a regular suit, in spite of the fact that the security bond had been executed before the decree was passed in the original suit, on the ground that its terms did not bring it within the purview of section 253, Civil Procedure Code.

It follows therefore that in the present case the objection against enforcing the security in execution must be even stronger.

This petition is accordingly rejected but without costs.

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1904. March 14.

## REVISIONAL CIVIL.

*Before Mr. Justice A. Rangaswami Iyengar.*

RANGASWAMAIYA, PETITIONER, (PLAINTIFF).

*v.*

RAMALINGA SASTRY, COUNTER-PETITIONER, (DEFENDANT).*

*Indian Limitation Act, sections 19 and 20—Suit on a bond—Payment of interest —Endorsement without actual payment—Acknowledgment within the meaning of section 19.*

A suit for the recovery of money due on a bond brought within three years from the date of an endorsement thereon to the effect that a few rupees were paid towards interest was dismissed by the Munsiff on the ground that actual payment was made one year after the endorsement when the time for the recovery of the debt had become barred. The plaintiff preferred this Revision Petition.

*Held*, that there was no warrant for narrowing the scope of section 20 of the Indian Limitation Act by interpreting it to apply only to actual payment of interest in cash or kind and therefore the decision of the Munsiff on the question of limitation was set aside.

Mr. *N. Cheluva Iyengar* for the petitioner.

ORDER.—The question for consideration in this Revision is, whether an endorsement made on the bond by the defendant that

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* Civil Revision Petition No. 105 of 1903-04 against the decision of the Additional Munsiff of Bangalore, in Small Cause No. 179 of 1903-04.

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Rs. 4 "were paid towards the interest due on this bond," when no money was actually paid, could save the limitation either as payment of interest under section 20, or as an acknowledgment of liability under section 19 of the Limitation Act.

The Advocate for the plaintiff relies on a case reported in Madras Law Journal Report, Vol. X part 1 page 25 (*Thesiga Iyengar* v. *Srinivasa Mudeliar*). In this case, part of the consideration due on a bond was a debt due by a third party. The obligee, having received a portion of it from that party, got the obligor to endorse it on the bond as a payment towards the debt. The Madras High Court held that actual money payment was not indispensable under the section and that the transaction embodied in the endorsement was intended to operate as a payment. 'Payment of money may be made and acknowledged in many ways besides that of actual delivery in coins or currency notes. Thus a man may assign a debt due to himself to the payee treating it as a payment of cash though the latter may receive the cash on a future date or not at all, or he may contract a fresh loan with the payee and pay whole or part of it back to the payee in adjustment of a prior debt. The whole of this transaction would only be a transaction on paper and no cash need have passed. There is therefore no warrant for narrowing the scope of the section by interpreting it to apply only to actual payment of interest in cash or in kind. In the present case, the plaintiff has stated that the defendant paid the Rs. 4 a year after the endorsement which shows that the transaction was not a nominal one. It might be inferred from this that the defendant contracted a fresh loan for Rs. 4 which he credited in payment of interest on the bond under the endorsement.

The decision of the Munsiff on the question of limitation is set aside and the case returned for a decision on the merits as the Munsiff has not recorded a finding whether or not the alleged payment of Rs. 7 should be credited to defendant in addition to that of Rs. 4 which plaintiff admits. Costs of this Revision case will follow the result of the suit.

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1904.
March 16.

# REVISIONAL CIVIL.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge.*

HANUMANTHA RAO, PETITIONER.

*v.*

PANTANGEE RAMAIYA AND ANOTHER, COUNTER-PETITIONERS.*

*Execution of decree—Attachment of moveable property—Bullocks—Amin entrusting them to a person for safe custody—Feeding charges incurred by custodian—Separate suit not necessary—How such charges are recoverable.*

A person to whom the Amin had entrusted some bullocks which were seized by him in execution of a decree, applied to the Court executing the decree for payment of feeding charges incurred by him while the bullocks remained in his custody. The Munsiff rejected the petition and directed the petitioner to sue for the money. The petitioner (custodian) presented this Revision Petition to the Chief Court.

*Held,* that, following the ruling of this Court in Civil Revision Petition No. 5 of 1900-01, which was to the effect that "it is incumbent on the Court to see that the proper payment is made and that the matter should be enquired into without requiring a separate suit to be brought for the purpose," the order of the Munsiff was set aside.

Mr. *T. Appu Rao* for the petitioner.

Mr. *C. V. Narasimha Iyengar* for the counter-petitioners.

ORDER—The petitioner was entrusted by an Amin with the custody of two bullocks which had been attached in execution of a decree. He prayed for an order for payment of the feeding charges from April 1902, the date of attachment, until March 1903 when the bullocks were ordered to be released. The Munsiff declined to entertain the petition and directed petitioner to sue for the money claimed by him. In a similar case, it was decided by the late Chief Judge and Justice Narahari Rao that "it is incumbent on the Court to see that the proper payment is made, and that the matter should be enquired into without requiring a separate suit to be brought for the purpose." (Civil Revision Petition No. 5 of 1900-01). I follow this ruling and set aside the order and direct the Munsiff to enquire into the petition.

The decree holder contends that the petitioner was not bound to keep the cattle in his custody for an indefinite period, that he ought

* Civil Revision Petition No. 53 of 1903-04 against the order of the Principal Munsiff, Bangalore, in Miscellaneous Case No. 1048 of 1902-03.

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to have insisted every month upon payment in advance, and that he was also guilty of fraudulent conduct in having set up a person to make a false claim to the attached property. These are the points which ought to be urged before the Munsiff.

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HANUMANTHA RAO v. PANTANGEE RAMAIYA

The costs of this petition will abide the result.

## REVISIONAL CIVIL.

1904. June 15.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

SUBBA RAO AND ANOTHER, PETITIONERS.

*v.*

SHESHANNA AND 6 OTHERS, COUNTER-PETITIONERS.*

*Succession Certificate Regulation—Regulation VII of 1901, section 4—Joint Hindu Family—Decree obtained by a deceased member thereof—Execution applied for by surviving members—No necessity for certificate—Presumption as to nature of debt where family is joint.*

The Petitioners who claim the money as surviving members of a Joint Hindu family, do not claim it as the effects of their deceased father and consequently their petition is not governed by the Regulation.

The corresponding Act (Act VII of 1889) which is in force in British India, is, according to the opinion of all the High Courts, confined to the case in which the claim is to the "effects," of the deceased and not to family property where the claim is by right of survivorship.

(*See* I. L. R., 20. M. 232; 22 M. 380; 19 B. 338; 17 A. 578 and 23, C. 912.)

It is not necessary that it should appear on the face of the bond or decree that the debt is due to the joint family and that fact may be established by other evidence.

EXECUTION APPLICATION. The sons of a Hindu family applied for execution of a decree obtained by their deceased father. The Munsiff directed them to produce a certificate under section 4, Succession Certificate Regulation.

The sons preferred this Revision Petition to the Chief Court.

Mr. *D. Venkataramayya* for the petitioners.

* Civil Revision Petition No. 80 of 1903-04, against the order of the Munsiff of Yedahalli in Execution Case No. 35 of 1903-04.



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1904.

SUBBA RAO v. SHESHANNA.

ORDER.—The petitioners applied for execution of a decree which had been obtained by their deceased father. The Munsiff of Yedahally directed them to produce a certificate under section 4 of the Succession Certificate Regulation, 1901. They contend that the debt is due to the joint family of which their deceased father was manager, and that they do not need a certificate to execute the decree.

Section 4 of the Regulation enacts that, "no Court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming *to be entitled to the effects of the deceased person,* or proceed, upon an application of a person claiming to be so entitled, to execute a decree" &c. It would seem that the petitioners who claim the money as surviving members of a joint Hindu family do not claim it as the effects of their deceased father, and that consequently, the petition is not governed by the Regulation. This is the opinion of all the High Courts on the construction of the corresponding section of the Succession Certificate Act which is in force in British India. (*See* I. L. R. 20 M. 232; 22 M. 380; 19 B. 338; 17 A. 578; and 23 C. 912). They hold that "the Act is confined to the case in which the claim is to the "effects" of the deceased, and not to family property, where the claim is by right of survivorship."

It has also been held that it is not necessary that it should appear on the face of the bond or decree that the debt is due to the joint family and that the fact may be established by other evidence (I. L. R., 20 M. 232).

We set aside the Munsiff's order, and direct him to make a fresh order with reference to the observations made above. The costs of this petition will abide the result.

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## REVISIONAL CIVIL.

1904.
June 18.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge.*

NEELAPPA AND ANOTHER, PETITIONERS, (PLAINTIFFS).

*v.*

SOMANNA, COUNTER-PETITIONER, (1ST DEFENDANT).*

*Civil Procedure Code, section 622—Costs—Order directing plaintiffs to furnish security therefor—Suit in forma pauperis—Court of Revision—Powers.*

In a suit for partition in *forma pauperis*, the Court ordered, on the application of the defendant, that the plaintiff should furnish security for defendant's costs. The plaintiff preferred a revision under section 622, Civil Procedure Code.

*Held*, that the District Judge had jurisdiction to make the order and that there was no reason for holding that he had improperly exercised his discretion.

Mr. *C. Krishna Murti* for the petitioners.

Mr. *B. Nagappa* for the counter-petitioner.

ORDER—The District Judge of Shimoga directed the plaintiffs to furnish security for defendant's costs of the suit. The plaintiffs have applied for revision under section 622 of the Code of Civil Procedure. Assuming that, as a Court of revision, we have power to set aside the interlocutory order (I. L. R. 14 Cal. 768), I fail to see any ground to warrant our interference. The District Judge had jurisdiction to make the order and he has stated that, in the peculiar circumstances of the case, it is necessary to demand security. Unless we sit, as a Court of appeal and consider the evidence, there appears no reason for holding that the District Judge has improperly exercised his discretion. I dismiss the petition with costs.

* Civil Revision Petition No. 134 of 1903-04, against the order of the District Judge, Shimoga, in Miscellaneous No. 297 of 1903-04.

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1904.
June 21.

## REVISIONAL CIVIL.

*Before Mr. Justice A. Rangasuami Iyengar, and Mr. Justice H. V. Nanjundayya.*

SIVARAMAPPA AND 3 OTHERS, PETITIONERS, (PLAINTIFFS).

*v.*

NADIGA THIMAPPA AND ANOTHER, COUNTER-PETITIONERS, (DEFENDANTS).*

*Heirship certificate—Promissory note in favor of a Hindu father—Suit by undivided sons—Plaint allegation that it was joint family property—Order directing production based on language of document merely—unsustainable.*

In a suit brought by sons on a promissory note executed by defendant in favour of their father, the Munsiff held that a certificate of heirship was necessary as there was nothing in the document to show that the sons had equal rights to the money which their father had lent to the defendants. On Revision, it was

*Held,* that the plaintiffs were not bound to take out a certificate of heirship if the promissory note in suit belonged to the joint family property of the plaintiffs and their deceased father as alleged in the plaint and that this being a question of fact which must be enquired into and determined by the Munsiff before he could insist upon its production, his present order was set aside.

Messrs. *B. Nanjundappa* and *S. Ranganna* for the petitioners.

ORDER—The plaintiffs are not bound to take out a certificate of heirship if the pro-note in suit belonged to the joint family property of the plaintiffs and their deceased father as alleged in their plaint. This is a question of fact which must be enquired into and determined by the Munsiff before he can insist upon the production of an heirship certificate. (*See* order of this Court in Civil R. Petition No. 80 of 1903-04).

The order of the Munsiff is set aside and the case remanded for disposal. The costs of this application will follow the final result.

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* Civil Revision Petition No. 110 of 1903-04, against the order of the Munsiff of Shimoga, in Small Cause No. 248 of 1903-04.

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## MISCELLANEOUS CIVIL.

1904.
February 18.

*Before Mr. Justice A. Rangaswami Iyengar, and Mr. Justice H. V. Nanjundayya.*

HOMBI AND ANOTHER, APPELLANTS, (DEFENDANTS), COUNTER-PETITIONERS.

*v.*

K. SREENIVASA IYENGAR, RESPONDENT, (PLAINTIFF), PETITIONER.*

*Second Appeal—Reversal of decree of Lower Appellate Court—Effect—Costs—Discretionary powers of Court.*

The plaintiff's suit was dismissed by the Munsiff but without costs. In appeal the District Judge reversed the decree. In Second Appeal the Chief Court reversed the decree of the Lower Appellate Court and dismissed the plaintiff's suit with costs throughout. The plaintiff has preferred this Civil Petition praying for a review of the order of the Chief Court regarding costs in the Munsiff's Court.

*Held*, that the fact that the Appellate Court allowed the plaintiff's claim in reversal of the decision of the Munsiff would have the effect of re-opening the case so far as it related to matters which were not finally adjudicated between the parties in the two Lower Courts.

*Held further*, that the question of costs was one of discretion of the Courts, depending on their decision as regards the subject-matter of the suit.

Mr. *J. C. S. Lawrance* for the petitioner.

ORDER – The plaintiff's suit for the recovery of some lands was dismissed by the Sub Judge of Mysore who ordered that the plaintiff and defendants should bear their own costs. Plaintiff alone appealed and this decree was reversed by the District Judge. In second appeal this Court reversed the decision of the District Judge and dismissed the plaintiff's suit with costs throughout.

The plaintiff has applied for a review of the order, directing plaintiff to pay defendants' costs in the Court of First Instance, on the ground that the defendants had not appealed or filed objection before the hearing of the appeal against that portion of the decree.

The question for consideration is, whether, on reversal of the decision of the Appellate Court, this Court was bound to restore that of the Original Court. The decree of the Court of first instance having

* Civil Petition No. 114 of 1903-04, praying that the Judgment passed by this Court, in Second Appeal No. 168 of 1901-02, may be reviewed.

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HOMBI v. K. SREENIVASA IYENGAR.

been set aside in appeal, that decree ceased to exist and it cannot be maintained that this Court was not competent to vary or modify the decision of the Court of First Instance. It is true, the defendants would not have been entitled to costs in the First Court if the Appellate Court had merely confirmed the decision of that Court and dismissed the appeal preferred to it. But the fact that the Appellate Court allowed the plaintiff's claim in reversal of that decision would seem to have the effect of re-opening the case so far as it relates to matters which were not finally adjudicated between the parties in the two Lower Courts. The question of costs is one of discretion of the Courts depending on their decision as regards the subject-matter of the suit. It cannot be said that because the First Court disallowed defendants' costs in the exercise of its discretion and the defendants did not care to appeal, their right to it should not be considered by the Court disposing of the case on the merits in Second Appeal.

Neither side having quoted any provisions of law or precedents bearing on the point, the case has to be decided on a general consideration of the discretionary powers of the Courts of appeal. There is, however, one decision quoted at 19 W. R. 152 which seems to favor the view expressed above though the facts of the 2 cases are not quite similar. In this case which had passed through many stages including an appeal to the Privy Council, the High Court of Calcutta held that it was open to them to construe the term "usual costs" used by the Court of First Instance in its decision to include all the costs which the successful party had incurred from the commencement of the suit till final decree.

In this view, there exists no necessity for an amendment of the decree and this application is rejected but without costs.

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# APPELLATE CRIMINAL.

*Before Mr. Justice A. Rangaswami Iyengar, and Mr. Justice H. V. Nanjundayya.*

NALLATHAMBI, APPELLANT, (ACCUSED).

1904. March 29.

*v.*

GOVERNMENT.

*Indian Penal Code, sections 411 & 414—Foreign Territory—Theft and dishonest retention of stolen property therein—Mysore Courts—Jurisdiction—Criminal Procedure Code, section 180, Illustration (b).*

The accused was charged before the Magistrate of Kolar Gold Fields for the offences of theft, dishonest possession of stolen property and assisting in the disposal of stolen property, committed in places beyond Mysore Territory. The Magistrate convicted the accused of offences under sections 411 & 414, Indian Penal Code and sentenced him to rigorous imprisonment for 6 months. In support of the conviction in appeal, it was contended that the trial was good as the case came within the meaning of Illustration (b) to section 180 of the Criminal Procedure Code.

*Held*, that as the local limits within which the cattle were dishonestly retained or disposed of, were not situated within Mysore Territory though outside the Magistrate's jurisdiction, the Illustration (b) of section 180, Criminal Procedure Code, was not applicable and therefore the convictions of the accused under sections 411 & 414, Indian Penal Code, were set aside.

*Reg.* v. *Adivigadu,* I. L. R., 1 *Madras,* 171, *followed ;*

*The Empress* v. *Sunker Gope,* I. L. R., 6 *Calcutta,* 307, *distinguished.*

Mr. *S. Ramaswami Iyer* for the Government.

JUDGMENT—In this case, cattle were missed by the 1st, 6th and 7th witnesses for the prosecution on the morning of the 23rd December 1903. On the 24th, the 5th witness for prosecution met the appellant and another leading the cattle. On the 25th December, the accused and his companion are stated to have sold two heads of cattle to 2nd witness for prosecution in British Territory and on the 31st December, the accused was discovered with another head of

* Criminal Appeal No. 185 of 1903-04, against the conviction and sentence by the 1st Class Magistrate, Kolar Gold Fields, under sections 411 & 414, Indian Penal Code, in Criminal Cases Nos. 370, 375 & 376 of 1903-04.



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NALLA-THAMBI v. GOVERNMENT.

cattle in his possession also in British Territory. The Magistrate held that the evidence was not sufficient to support the charges of theft under section 379 I. P. C. and convicted the accused of assisting in disposal of stolen property and possession of stolen property under sections 414 and 411.

It is admitted that the latter offences occurred in British Territory. The first question for consideration, is, therefore, whether the accused could be tried for them in this State. The Government Advocate relied upon Illustration (b) to section 180, Criminal Procedure Code, and cited 6 Cal., 307. But as, in this case, the local limits within which the cattle were dishonestly retained or disposed of are not situated within Mysore Territory though outside the Magistrate's jurisdiction, the Illustration does not seem to be applicable. As observed by the Madras High Court in *Reg.* v. *Adivigadu* (1. M. 171) in a similar case with reference to the offence of theft, if one of our Courts had jurisdiction to try the offence of dishonestly retaining stolen property, another Court in which the property was stolen would have jurisdiction to try the offence though the former offence was not committed within its jurisdiction. The decision reported at 6 Cal., 307, is authority only for holding that, though the offence of theft might have been committed in Native Territory, the accused might be tried in British Territory for offences of retaining stolen property if he were arrested with the same in such territory and cannot serve as a guide in this case. (*See* also remarks of Sir T. Prinsep on para. 1 of section 181 and remarks of the Madras High Court in Bapu Daldi, 5 Mad. 23). The convictions of the accused under sections 411 and 414 must therefore be set aside.

We are not, however, disposed to agree with the Magistrate in holding that the evidence was not sufficient to prove that the accused had committed theft of the cattle. The cattle must have been removed on the night of the 22nd or in the early morning of the 23rd December and the 5th prosecution witness met the accused with the cattle on the 24th within two days after their theft. This recent possession is sufficient to convict the accused of the offence of theft or dishonest misappropriation of property. The conviction will accordingly be altered, the sentences being retained, and this appeal dismissed.

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## APPELLATE CRIMINAL.

*Before Mr. Justice A. Rangaswami Iyengar, and Mr. Justice H. V. Nanjundayya.*

IN CRIMINAL APPEAL NO. 205.

HUCHEY GOWDA, APPELLANT, (2ND ACCUSED).

1904.
June 30.

*v.*

GOVERNMENT.

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IN CRIMINAL APPEAL NO. 208.

NARASIMHAIYA, APPELLANT, (1ST ACCUSED).

*v.*

GOVERNMENT.*

*False charge—False charge made to Police—Sanction to prosecute therefor—Unnecessary—Indian Penal Code, sections* 182 *and* 211.

The accused were charged before the 1st Class Magistrate of Tumkur with offences under sections 182 and 211, Indian Penal Code. The Magistrate convicted and sentenced the accused under section 182, Indian Penal Code, remarking that he considered it unsafe to frame a charge under section 211, in the absence of the Magistrate's sanction.

*Held*, that as the false charge in this case was not committed in or in relation to any proceeding in any Court, no previous sanction was necessary to prosecute the accused therefor.

*Ramasami* v. *The Queen Empress, I. L. R.*, 7 *Madras*, 292; *Karim Buksh* v. *The Queen Empress, I. L. R.*, 17 *Calcutta*, 574; and *Imperatrix* v. *Jijibhai Govind, I. L. R.*, 22 *Bombay*, 596, *followed.*

Messrs. *D. Venkataramayya* and *P. Mahadevayya* for the appellant in No. 205.

Mr. *William Hayes, Junior,* for the appellant in No. 208.

Mr. *S. Ramaswami Iyer* for the Government.

JUDGMENT—Narasimhaiya, appellant in Criminal Appeal No. 208, complained to the Police of the Tiptur Taluq, on 31st January 1903,

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* Criminal Appeals Nos. 205 and 208 of 1903-04, against the conviction and sentence by the 1st General Assistant Commissioner and 1st Class Magistrate, Tumkur, under section 182 in Criminal Case No. 31 of 1903-04.

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that he had been severely assaulted and robbed by three persons. The appellant in No. 205, Huchey Gowda, sent telegrams to the Deputy Commissioner and Police Superintendent, that the former was lying in a dangerous state. After investigation, the Police sent a B Report. But as the appellant Narasimhayya pressed his accusation, the Magistrate Mr. Sreenivasa Row, took the case on file, and after an exhaustive enquiry dismissed it, holding that "the complaint was altogether unfounded." The Head Quarter Police Inspector then laid a complaint against the two accused under sections 182 and 211 of the I. P. Code. The Magistrate (Mr. Seshadri Iyengar) considered that sanction of the former Magistrate was necessary. But that Magistrate, while stating that he had not "the slightest objection to grant sanction, if such sanction were necessary, held that it was not required." Mr. Seshadri Iyengar then tried the case and convicted and sentenced the accused under section 182 I. P. C., remarking that he considered it unsafe to frame a charge under section 211 in the absence of Magistrate's sanction.

The first point for consideration is, whether sanction is required under section 211 in the present case. As observed by the Madras High Court in *Ramasami* v. *Queen Empress* (7 Madras 292), the false charge in this case was not committed in or in relation to any proceeding in any Court and no previous sanction was necessary. It may also be observed that, when a specific charge of a serious offence has been made as in this case, it is more proper to try the case under section 211, I. P. C. than under section 182. (*See* 17 C. 574 and 22 B. 596.)

Now to come to the facts. The story of the accused is that, as he passed by the shed of Vencataramiah at 8 a. m., on the 31st January 1903, he was followed by the latter and assaulted and that two others, who were loading a cart, also joined him in the attack. This is denied by the three persons on oath and some other witnesses also deny that there was any disturbance at the time and place referred to by the accused. The principal item of evidence against the truth of the allegations of the accused is the fact that the Hospital Assistant was not able to discover any injuries on the neck of the first accused and that the latter was able to return home at once. The Magistrate has also detailed the strained relations between the first accused and Shanbhogh Vencataramiah which afford strong circumstantial evidence against him. We agree with the Magistrate

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in considering that the eye witnesses to the assault examined by the accused is not worthy of credit and that the statements of the other witnesses are not reliable.

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The conviction of both appellants was therefore proper and must be affirmed. We consider it, however, undesirable to remand the accused to Jail and direct that, in addition to the actual imprisonment already undergone, the 1st accused Narasimhaiya do pay a fine of Rs. 150 (Rs. 100 more than the fine inflicted by the Magistrate) and in default, to undergo two months' rigorous imprisonment, and that Huchey Gowda pay altogether a fine of Rs. 75 and in default suffer simple imprisonment for two months.

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## REVISIONAL CRIMINAL.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge.*

*In re.* GUTTIYAPPA, (ACCUSED).*

1904. January 20.

*Mysore Excise Regulation, V of 1901, section 56, clause (b)—Akkibhoja—Sale in an appointed place on a non-shandy day—Legality.*

*Held*, that the mere fact that Akkibhoja was sold on a day on which there was no shandy was insufficient to support the conviction, if the sale was made in an appointed place, and that as the sale appeared to have been made in the shop described in the license, the conviction was set aside.

The facts are sufficiently stated in the following Reference by the District Magistrate of Kadur :—

"The complaint was that the accused, contrary to the provisions of condition 10 of the Akkibhoja license granted to him for the official year 1902-03, sold Akkibhoja at his shop on other than the shandy day at Yedahalli, *i. e.* on Sunday the 28th June 1903, the shandy at Yedahalli being held on Saturdays, and thereby committed an offence punishable under clause (b) of section 56 of the Mysore Excise Regulation No. V of 1901.

2. The Amildar Magistrate of Koppa, Mr. B. M. Venkatesiah then in charge of the Yedahalli Sub-Taluk, found the accused guilty of the offence complained of and sentenced him to pay a fine of Rs. 2, in default, to suffer simple imprisonment for 5 days.

3. Para 10 of the Akkibhoja license reads as follows:—

'Akkibhoja shall invariably be sold in appointed places only in fairs or in shandies and Jatras.' The Amildar Magistrate's interpretation of this condi-

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* Criminal Revision Case No. 153 of 1903-04. (Reference by the District Magistrate of Kadur, in Criminal Case No. 23 of 1902-03 on the file of the Deputy Amildar and 3rd Class Magistrate of Yedahalli).

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1904.

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tion as restricting the place of sale of Akkibhoja to fairs or shandies and Jatras, and the days of the sale to those on which such fairs or shandies or Jatras are held is incorrect. The first para of the license (herewith forwarded) authorises the sale on the premises of the shop and para 10 extends the sale to fairs or shandies and Jatras but in appointed places only. The sale of the liquor on the premises of the shop on other than the shandy day is nowhere forbidden. The conviction of the accused is therefore illegal.

4. The following passage taken from the Excise Commissioner's memo No. 6871 dated 30th June 1903, supports the view above mentioned.

"There are typographical errors in license condition 10. There should have been a cama and the word "and" after the word "only" in it. Accordingly necessary correction should be made in the printed forms before issuing licenses." The corrected condition will be as follows:—

"Akkibhoja shall invariably be sold in appointed places only, and in fairs or shandies and Jatras."

5. The records in the case will accordingly be submitted to the Chief Court with the recommendation that the conviction may be set aside and the fine levied from the accused be refunded to him."

ORDER—The Subordinate Magistrate was of opinion that the accused acted contrary to the license, by selling "Akkibhoja," on Sunday which was not a 'Shandy' day at Yedehalli. Condition 10 of the license as amended by the Excise Commissioner is as follows:—"Akkibhoja shall invariably be sold in appointed places only, and in fairs or Shandies and Jathras." The mere fact that Akkibhoja was sold on a day on which there was no shandy is insufficient to support the conviction, if the sale was made in an appointed place. The sale appears to have been made in the shop described in the license. The conviction is set aside and the fine, if levied, will be refunded.

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# REVISIONAL CRIMINAL.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

*In re.* DODDE GOWDA, ACCUSED.*

1904. January 26.

*Mysore Excise Regulation V of 1901, sections 12, and 55, proviso—Drawing toddy from date trees—Enhanced punishment—Liability.*

As the offence of manufacture of liquor is stated separately in the body of the section from that of tapping a toddy producing tree or drawing toddy, it must be presumed that the Legislature did not intend to make the *proviso* applicable to the specific offences of drawing toddy or tapping a toddy producing tree. The opinion of the Taluk Magistrate that the *proviso* applies only to manufactures of intoxicating drugs appears to be correct.

This was a reference, in the following terms, by the District Magistrate of Mysore :—

(1) The accused in these cases was prosecuted for drawing toddy from date trees—two in case No. 13 and one in case No. 14—not marked by the Excise officials, an offence punishable under sections 12 and 55 of the Excise Regulation. He was convicted by the Magistrate in both the cases and sentenced to pay a fine of Rs. 3 in the one case, Rs. 1-5-3 in the other case.

(2) The Excise Divisional Officer remarks that the fines imposed are very small and that they should have been according to section 55 of the Excise Regulation not less than double the amount of duty leviable. The Magistrate explained that the provision regarding enhanced punishment applies only to manufactures of intoxicating drugs but not to the manufacture of toddy. But I think the provision is applicable to the manufacture of toddy also. So the fine should have been double the fee leviable, which is Rs. 2-10-6 in one case and Rs. 1-5-3, in the other.

Irrespective of this provision, the fines imposed are inadequate and contravene the instructions contained in the Chief Court Circular No. 151 dated 29th January 1903. I therefore submit the case to the Chief Court under section 438 of the Criminal Procedure Code for the enhancement of the punishment."

ORDER—The word liquor includes Toddy and " manufacture " includes any natural or artificial process by which liquor is prepared or produced and it may be contended with reason that the phrase " manufacture of liquor " in the proviso to section 55 of Regulation 5 of 1901 is comprehensive enough to apply to the drawing of toddy.

* Criminal Revision Case Nos. 134 & 156 of 1903-04. (Reference made by the District Magistrate of Mysore in Criminal Cases Nos. 13 & 14 of 1903-04, on the file of the Taluk Magistrate of Hunsur).

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1904.

DODDE GOWDA

But as, in the body of this section, the offence of manufacture of liquor is stated separately from that of tapping a toddy producing tree or drawing toddy, it must be presumed that the Legislature did not intend to make the proviso applicable to the specific offence of drawing toddy or tapping a toddy producing tree. In this view, the opinion of the Taluk Magistrate on the question of law appears to be correct.

But he is not right in inflicting nominal fines when the accused admitted that trees which had not been numbered and given to him had been tapped and that pots had been tied to them for drawing toddy. He has adduced no evidence to prove that it was due to any mistake or excusable oversight. In such cases, the fines should be corrective and deterrent and not merely nominal. The fines will accordingly be raised to ten and five rupees respectively in the two cases.

## REVISIONAL CRIMINAL.

1904. February 12.

*Before Mr. Justice A. Rangaswami Iyengar.*

*In re.* D. RANOJI, COUNTER-PETITIONER.*

*Criminal Procedure Code, section 517—Order for disposal of property when there is no reason to believe that there has been an offence committed with regard to it—Magistrate's power to act as an arbitrator or order Police to take charge of property as to which the parties appear to have a civil dispute.*

Unless there is reason to believe that any offence has been committed with reference to property produced before him, a Magistrate has no authority, under section 517, Criminal Procedure Code, to pass any order with reference to any property.

A Magistrate has no right to act as an arbitrator between parties or to order the police to take charge of property regarding which the parties appear to have a civil dispute.

The facts are fully stated in the following order passed by the Chief Court in the exercise of its Revisional Powers.

ORDER—The procedure followed by the City Magistrate of Mysore in this case appears to be irregular and the order passed by him *ultra vires*.

* Criminal Revision Case No. 159 of 1903-04. (Criminal Miscellaneous Case No. 94 of 1903-04 on the file of the City Magistrate of Mysore).

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1904.

D. RANOJI.

The petition of complaint did not specify the nature of the offence or the section of the Penal Code under which it fell. The complainant merely stated that the accused obstructed the removal of her own property, that she had placed it in a room under police guard and prayed that the Magistrate might be pleased to punish the accused, have the property brought before Court and grant protection to the complainant in removing the property. In her examination before the Magistrate, she further stated that, when she was going to remove her jewels, accused said that he would assault her and take away the jewels by force, that she locked up the property and that he had also put up a lock on the door.

Upon this, the Magistrate ordered notice to issue to accused to show cause why process should not issue. It is not clear under what authority he passed this order as it is not in accordance with the provisions of section 203 or 204.

The next order of the Magistrate is as follows :—

"Both parties agree that the property may be sent for and kept in the Court until the matter has been settled by a competent Civil Court. Counter-petitioner also agrees that, if he does not file a Civil Suit by the 7th January next, the property may be given back to petitioner.

An order will issue to the Police to take possession of the property and deliver it over to the care of this Court.

Complaint petition is dismissed under section 203, C. P. C."

Unless there was reason to believe that any offence had been committed with reference to property produced before him, a Magistrate has no authority under section 517, Criminal Procedure Code, to pass any order with reference to any property. He had no right to act as an arbitrator between parties or to order the Police to take charge of property regarding which the parties appear to have a civil dispute.

As the time fixed for the filing of the Civil Suit has expired, it is sufficient to communicate these remarks for the information and guidance of the Magistrate.



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# REVISIONAL CRIMINAL.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge.*

1904. February 18.

*In re.* VENKATASAWMI, ACCUSED.*

*Criminal Procedure Code, sections* 161, 164 *&* 364—*Statements made before the Police—Recorded in a narrative form—Admissibility—False evidence—Indian Penal Code, section* 193.

The accused was charged with having given false evidence either before a Police Officer under section 161 of the Code of Criminal Procedure or before a Magistrate. He was acquitted because the Magistrate was of opinion that the statement which the accused had made before the police was inadmissible in evidence as it was in a narrative form and did not show what questions were put to him. The Chief Court, in the exercise of its Revisional powers,

*Held*, that the decision of the Chief Court in Criminal Appeal No. 88 of 1899-1900 to the effect that "if the entire statement is made in answer to a single question put to a person by a Police Officer under section 161, it is sufficient to render such a person liable for a falsehood contained in such statement," should be followed.

ORDER—The accused was charged with having given false evidence either before a Police Officer under section 161 of the Code of Criminal Procedure or before a Magistrate. He was found not guilty and acquitted, because the Magistrate was of opinion that the statement which the accused had made before the Police was inadmissible in evidence, as it was in a narrative form and did not show what questions were put to him. In support of his opinion, the Magistrate quoted the judgments reported in Mysore Law Reports, Vol. 17 p. 537 and in Indian Law Reports, Vol. 15 p. 11.

The judgment reported in the Mysore Law Reports does not support the Magistrate. Mr. Thambu Chetty, J., declined to admit the statement, because "*a general statement of complaint made before a Police Officer* does not come within the second clause of section 161 of the Code of Criminal Procedure." Mr. Justice Krishna Murthi held as follows:—The statements of both the men are said to have been taken under section 161, at least there is an express reference to that section. There is no doubt whatever that their examination took place in the course of an investigation by a Police Officer. The statement has been taken in a narrative form; and

* Criminal Revision Case No. 102 of 1903-04. (Criminal Case No. 2 of 1903-04 on the file of the Acting Extra Assistant Commissioner and 1st Class Magistrate of Malur-Mulabagal Range).

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the only witness examined for the defence has admitted that the accused was examined by the Police. It is difficult to get rid of the obligation laid down by section 161 if the whole statement has been made in answer to a single question as to what the witness knew in the case." I concurred with Krishna Murthi J. and decided that "the statement purported to have been made under section 161 of the Code, and it might be presumed that the answer was given to a question put by the Investigating Officer as the accused admitted having been examined by the Jamedar."

The Judges of the Allahabad High Court also do not insist upon every question and answer being recorded:—"Sections 164 and 364 do not apply to an examination under section 161 of the Code of Criminal Procedure. If the Police Officer were at the completion of each sentence by the person whom he was examining to stop that person and ask a fresh question, it is probable that the whole truth would not come out."

The question was discussed before this Court in Criminal Appeal 88 of 1899—1900 and it was decided by Best, C. J. and Narahari Row, J. that "if the entire statement is made in answer to a single question put to a person by a Police Officer under section 161, it is sufficient to render such a person liable for a falsehood contained in such statement."

The statement which was made by the accused before the Police purports to have been made under section 161 of the Code, and the accused admits that he was examined by the Police and pleads that he did not voluntarily make such statement. If the Magistrate had any doubt in regard to the matter, he might have examined the Police Officer, who recorded the statement and any person in whose presence the examination was made. Since the accused is a young boy, about 15 years old, it is not necessary to take further action against him.

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# REVISIONAL CRIMINAL.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge.*

1904. February 13.

*In re.* SANTHE GOWDA & 2 OTHERS, ACCUSED.*

*Indian Penal Code, section 353—Assaulting a public servant—Arrears of Revenue—Amildar's order to attach moveables therefor—Sheikdar executing such order—Assault on him, whether an offence under the section.*

The accused was charged with assaulting a Sheikdar when he was executing an order of the Amildar for attaching the moveables belonging to the accused for arrears of Revenue due by him to Government. The Magistrate was of opinion that the Amildar was wrong in ordering attachment of moveables and that the Sheikdar was not engaged in the lawful discharge of his duty and therefore acquitted the accused.

*Held,* on a perusal of the records, that although the Amildar wrongly exercised his discretion in ordering the attachment of moveables, yet his order was legal and therefore the Sheikdar who was legally bound to carry it out, was assaulted in the execution of his duty as a public servant.

The Chief Court passed the following

ORDER—The complainant, a Sheikdar, was ordered by his Amildar to attach the moveable property of the 1st accused for arrears of revenue. When the Sheikdar attempted to make an attachment, he was assaulted by the defaulter and two other persons. The accused persons were charged under section 353 of the Penal Code, with having assaulted public servant. The Sub-Division Magistrate of Saklespur was of opinion that they did not commit an offence under the above section and that the complainant was not engaged in the lawful discharge of his duty as a public servant, inasmuch as the Amildar was wrong in ordering the attachment of moveables before any action had been adopted against the immoveable property of the defaulter.

The opinion of the Magistrate might be correct, if the Amildar had no power at all to order the attachment of moveables. The Magistrate grants that the Amildar had such power but held that the power was improperly exercised in this case. It might be, that the Amildar wrongly exercised his discretion. Nevertheless the order was legal and the Sheikdar who was legally bound to carry it out, was assaulted in the execution of his duty as a public servant.

* Criminal Revision Case No. 105 of 1903-04. (Criminal Case No. 8 of 1903-04 on the file of the Sub-Division Magistrate of Saklespur).

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1904.

SANTHE GOWDA.

The question is discussed in Mayne's Commentaries on the Criminal Law, pp. 439 and 440—"Acts purporting to be done under the authority of the law may be illegal, where the warrant under which, the Officer acts is on its face legal, even though defective in form, and is issued by an authority competent to issue such a warrant, but was improperly or irregularly issued. * * * * In this case, resistance is always unlawful."

It is sufficient to point out the error to the Magistrate. There is no need to order further enquiry since the complainant did not care to press his complaint and the withdrawal was permitted by the Magistrate.

## REVISIONAL CRIMINAL.

1904. February 20.

*Before Mr. Justice A. Rangaswami Iyengar.*

*In re.* BHARMANNA, APPELLANT.*

*Criminal Procedure Code, section 33—Fine—Imprisonment in default of payment thereof—Whether a Court is bound to pass such a sentence—Indian Penal Code, section 64.*

Section 64, Indian Penal Code, read with section 33, Criminal Procedure Code, does not appear to require that a sentence of imprisonment should be passed in default of payment of fine.

The order of Reference which was passed by the Sessions Judge of Shimoga so far as it relates to the point in question is as follows:—

"The Magistrate has overlooked the provisions of section 33 Criminal Procedure Code, and section 64 Indian Penal Code, by not awarding sentence of imprisonment to be suffered by accused in case of default of payment of fine. This Court cannot rectify this omission, because if such imprisonment is passed here, this Court will be virtually adding to the sentence given by the Magistrate. The enhancement is not within the province of this Court.

Under section 438 Criminal Procedure Code, the matter is therefore respectfully submitted to the Hon'ble Chief Court for orders as regards the fine imposed under the first count."

The Chief Court passed the following

ORDER—Section 64, I. P. C. read with section 33, Criminal Procedure Code, does not appear to require that a sentence of imprisonment should be passed in default of payment of fine. (*See* p. 14 Weir's Digest, 2nd Edition.)

* Criminal Revision Case No. 181 of 1903-04. (Reference by the Sessions Judge of Shimoga in Criminal Appeal No. 16 of 1903-04 on the Sessions Judge's file, against the conviction and sentence passed in Criminal Case No. 16 of 1903-04 on the file of the Assistant Commissioner and 1st Class Magistrate of Davangere.)

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# REVISIONAL CRIMINAL.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge.*

1904. March 14.

*In re.* MAHOMED SAB, ACCUSED.*

*Indian Penal Code, section 283—Leaving a bullock cart unattended in a public road—Calf run over and killed—Whether an injury to the owner of the calf under the section.*

The accused was charged with having left his cart with bullocks yoked to it unattended in a public road with the result that the bullocks started and the wheels ran over a calf and killed it. He pleaded guilty and the Magistrate convicted him of an offence under section 283, Indian Penal Code, and passed a sentence of fine only. The District Magistrate being of opinion that the section was applicable only to acts causing damage or injury to persons using the road, referred the case to the Chief Court for orders under section 438, Criminal Procedure Code.

*Held*, that there was nothing in section 283, I. P. C., which showed that any harm illegally done to a man's property was intended to be excluded from its operation.

ORDER.—The accused negligently allowed his cart to run over the neck of a calf and to kill it. He was convicted under section 283 of the Penal Code and sentenced to pay a fine. The District Magistrate thinks that the conviction is illegal, since the accused did not cause injury to any person. It is not apparent that the expression, "injury to any person" is used in the section in the sense of an injury to the body or life of an individual. The word injury "denotes any harm whatever, illegally caused to any person, in body, mind, reputation *or property*"—(section 40). There is nothing in section 283 which shows that any harm illegally done to a man's property was intended to be excluded from its operation. There is no ground for interference in revision.

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* Criminal Revision Case No. 275 of 1902-03. (Reference by the District Magistrate of Shimoga in Criminal Case No. 129 of 1902-03 on the file of the Assistant Commissioner and 2nd Class Magistrate of Shimoga).

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# REVISIONAL CRIMINAL.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge.*

*In re.* KADA (ACCUSED).*

1904. March 14.

*Iysore Arms Regulation VI of* 1890, *section* 14, *clause (d)—Possession of a gun without a license.*

The accused who was carrying a gun which his father had left on a thresh-ıg floor, was charged with having a gun without a license and thereby having ommitted an offence under section 14, clause (d) of the Arms Regulation VI f 1890. The Magistrate convicted and sentenced him to a fine of Rs. 15. The hief Court in exercise of its Revisional powers

*Held*, that the Legislature did not appear to have contemplated that each nember of a household must take out a license for one and the same gun and herefore the conviction of the accused for being in possession of his father's un without a separate license was set aside.

ORDER—The accused Kada has been fined for going armed without a license.

The evidence against the accused is that of a Police Constable who says he met the accused with the gun on the way to Chenna-sandra, that he asked the accused for his license, that he replied that it was in his house and that he would get it and that as he did not come back with the license, he took possession of the gun.

No doubt, the constable speaks the truth when he says he met the accused with his father's gun, but as he did this on a public foot-path, and not one of the witnesses even mentions the word "Shikar," the Magistrate was not correct in assuming that the accused was out shooting. The question is whether the accused in carrying about his father's gun, has committed an offence.

The Legislature does not appear to have contemplated that each member of a household must take out a license for one and the same gun, and that a son, who was in this instance (for there is not a word in the evidence about shooting, while there is a good deal said about the threshing floor) merely carrying the gun for his father, from or to their stack-yard, should be prosecuted for not having a license.

The conviction is set aside, and the fine, if recovered, will be refunded to the accused.

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* Criminal Revision Case No. 386 of 1902-03. (Criminal Case No. 176 of 1902-03 on the file of the 1st Class Magistrate of Closepet Range).

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# REVISIONAL CRIMINAL.

*Before Mr. Justice A. Rangaswami Iyengar,*
*and Mr. Justice H. V. Nanjundayya.*

*In re.* RAMIAH AND ANOTHER, ACCUSED.*

1904.
April 7.

*Court Fees Regulation, section 39—Repayment of stamp and process fees to complainant—Obligatory on convicting Court to order the same.*

The Magistrate of Sagar convicted the accused of offences under sections 352, 355 & 323, Indian Penal Code, and awarded a certain sum of money to the complainant being the expense of stamps incurred by him. The Sessions Judge, on appeal, disallowed the same as he was of opinion that the complainant had included some false counts in the charge. In the exercise of the Revisional Powers, the Chief Court

*Held*, that section 39 of the Court Fees Regulation makes it imperative on the convicting Court to order the repayment of the stamp and process fees and therefore the order of the Sessions Judge was set aside.

ORDER—The first class Magistrate of Sagar convicted the appellants of offences under sections 352, 355 and 323 of the Penal Code

The Sessions Judge affirmed the conviction under section 352 and held that the other two charges had not been made out.

The Magistrate had awarded Rs. 11—4—0, expense of stamps etc., incurred by the complainant. The Sessions Judge directed that 'as complainant included false counts, he will have no costs.'

Section 39 of the Court Fees' Regulation makes it imperative on the convicting Court to order the repayment of the stamp and process fees. The order of the Sessions Judge is set aside and that of the Magistrate is restored.

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* Criminal Revision Case No. 220 of 1903-04. (In the matter of an order, passed by the Sessions Judge of Shimoga in Criminal Appeal No. 14 of 1903-04. modifying the conviction and sentence in Criminal Case No. 15 of 1903-04, on the file of the 1st Class Magistrate of Sagar.)

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# REVISIONAL CRIMINAL.

*Before Mr. Justice A. Rangaswami Iyengar, and Mr. Justice H. V. Nanjundayya.*

*In re.* RANGA AND ANOTHER, PETITIONERS, (ACCUSED).*

1904. June 20.

*Criminal Proceedings—Irregularity—Evidence in one case admitted wholesale in another—Consent of parties—Admissibility—Criminal Procedure Code, section 537—Indian Evidence Act, section 33.*

A Magistrate admitted the evidence in one case wholesale in another, without the testimony of any witness whatever being recorded in the latter, with the consent of both parties.

*Held,* that the procedure of the Magistrate was irregular and that mere consent of parties could not legalize an important departure from rules of procedure which was Public Law.

*Queen Empress* v. *Nand Ram, I. L. R.,* 9 *Allahabad,* 609, *referred to.*

In the exercise of its Revisional Powers, the Chief Court passed the following

ORDER—Evidence taken in one case has been admitted wholesale in another case, without the testimony of any witness whatever being recorded in the latter, with the consent of both the parties. This is irregular. The occasions on which such evidence may be imported into a different case are defined by special provisions in the Evidence Act and Codes of Procedure. Mere consent of parties cannot legalize an important departure from rules of procedure which is Public Law. *See* 9 All. 609. If admissible at all, such statements should be brought in under section 33 of the Evidence Act, but this case does not seem to be one in which the Court would be justified in holding that the presence of witnesses could not be obtained without an amount of unreasonable delay or expense.

We do not, however, consider it necessary to annul the proceedings, as the accused have not been prejudiced by this irregular procedure, (section 537). The record will be returned.

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* Criminal Revision Petition No. 141/Criminal Revision Case No. 225 of 1903-04, praying that the proceedings of the 1st Assistant Commissioner and 1st Class Magistrate of Kadur in Criminal Case No. 71 of 1903-04 may be revised.



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# REVISIONAL CRIMINAL.

*Before Mr. Justice A. Rangaswami Iyengar, and Mr. Justice H. V. Nanjundayya.*

1904. June 29.

## *In re.* NANJUNDA CHARI, ACCUSED.*

*Court Fees Regulation, Schedule II, Art. 1 (b)—Criminal Court—Compromise—Petition to report to Court—Stamp necessary.*

A petition informing the Court of the compounding of a case and requesting that it may be struck off, properly falls under Art. 1 (b) Schedule II of the Court Fees Regulation and should bear a stamp of eight annas.

*I. L. R.*, 8 *Madras*, 15, *followed.*

The District Magistrate of Bangalore submitted the following proceedings for the orders of the Chief Court :—

"1. The facts of the case are :—

The 1st of the 3 accused in the case slippered the complainant with intent to dishonor him and the remaining 2 abetted the 1st accused.

2. In this case the complainant with his pleader appeared before the Court, the Vakalatnama of the pleader was received by the Court and the statement of the complainant was taken and the case was posted for hearing on the 15th December 1903. The needful processes were issued accordingly. On the day of hearing neither the complainant nor the accused appeared before the Court but the pleader for the complainant appeared and reported that the case was compounded outside the Court, and he also presented to the Court for acceptance, a Razinama, bearing the signature of the complainant as well as the accused persons; but this Razinama does not bear the required stamp of annas 8. Still the Magistrate ordered thereon thus:—

" Presented by Mr. Venkatramiah, pleader for the complainant. File with records."

Thereupon the Magistrate passed his final order to the effect that as the complainant did not appear in person, etc., the accused were acquitted under section 259, Criminal Procedure Code.

3. The following points were observed :—

(I) Section 259, Criminal Procedure Code, authorizes a Magistrate to discharge accused person, but not to acquit him.

(II) Though the complainant did not appear before the Court on the date of hearing to report his compromise of the case, yet, his pleader whom the Court has accepted to do all legal actions in the case for the complainant, appeared before the Court, reported the compromise of the case and also presented a

* Criminal Revision Case No. 191 of 1903-04. (Reference by the District Magistrate of Bangalore, in Criminal Case No 31 of 1903-04 on the file of the Assistant Commissioner and 1st Class Magistrate of Bangalore Range.)

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Razinama, bearing the signatures of the parties. This was sufficient authority for the Magistrate to pass his final order, under section 345, Criminal Procedure Code. His order under section 259 does not seem to be legal. 1904.

NANJUNDA CHARRI.

4. Further instructions are solicited as to whether a Razinama of the kind when presented to a Court should bear a stamp of annas 8."

ORDER—We consider that a petition informing the Court of the compounding of a case and requesting that it may be struck off, properly falls under I(b) of Schedule II of the Court Fees Regulation (Petition presented to a Criminal Court and not otherwise provided for in the Regulation) and should bear a stamp of eight annas, (I. L. R. 8 Madras, 15).

We may also observe that the Magistrate should have taken action on the razinama, since he did not object to receive it without a stamp and not have proceeded to dispose of the case on the ground that the parties had failed to appear before the Court.

## REVISIONAL CRIMINAL.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge.*

*In re.* RAMA SETTY, PETITIONER, (ACCUSED)*

1904. January 16.

*Indian Penal Code, sections, 379 & 411—Separate charges—Conviction under one—Alteration of conviction in appeal—Conviction on one only of two charges does not amount to acquittal upon the other charge—Criminal Procedure Code, sections 236 and 237.*

The Petitioner was charged by the Police for cutting and removing and also for being in unlawful possession of teak wood from District Forests, offences punishable under sections 379 and 411, I. P. C. The Magistrate upon evidence framed separate charges under sections 379 and 411 but convicted the Petitioner only under section 379. On appeal to the Sessions Judge, the conviction was altered to section 411 and the sentence of imprisonment was reduced.

The Petitioner in applying for revision of the Judgment of the Sessions Judge, contended that the conviction by the Magistrate only under section 379 although there was a separate charge under section 411, amounted to an acquittal under the latter section, therefore the interference of the Sessions Judge, was illegal as it practically interfered with an acquittal. On Revision it was

* Criminal Revision Petition No. 49 of 1903-04 praying that the Proceedings of the Sessions Judge of Shimoga in Criminal Appeal No. 15 of 1902-03 modifying the conviction and sentence passed by the 2nd General Asst. Commr. and 1st Class Magistrate, Shimoga, may be called for and revised.

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1904.

RAMA SETTY.

*Held*, that the contention was unsound as section 236 of the Code of the Criminal Procedure authorized the Magistrate to frame charges in the alternative and that conviction under one section did not amount to an acquittal under the other.

Messrs. *B. Nanjundappa* and *S. Ranganna* for the petitioner.

ORDER—The petitioner was charged in the alternative with theft or with dishonest possession of 30 logs of teak. The Assistant Commissioner and Magistrate, who tried the case, was of opinion that the evidence was sufficient to prove the offence of theft. Accordingly, he convicted the petitioner under section 379 of the Penal Code and sentenced him to suffer simple imprisonment for three months and to pay a fine of Rs. 300. On appeal, the Sessions Judge found that the charge of theft was not proved and that the petitioner was guilty only of having dishonestly received or retained stolen property. The sentence of fine was upheld and the period of imprisonment was reduced to a week. The petitioner has applied for revision.

It is contended that the Magistrate virtually acquitted the petitioner of the offence under section 411 of the Penal Code and that the Sessions Judge was wrong in convicting him of the said offence. The contention is unsound; for section 236 of the Code of Criminal Procedure authorizes a Magistrate to frame charges in the alternative "if a single act or series of acts, is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute." If there is no doubt about the facts themselves, but there is room for an honest difference of opinion as to the application of a particular section of the Penal Code to those facts, an accused person may be charged in the alternative; or he may be charged with one offence only and convicted of another offence for which, an alternative charge might have been framed against him (section 237). If a Magistrate in such a doubtful case, chooses to apply to the facts, one section of the Penal Code, rather than another, it is not tantamount to an acquittal of the offences for which alternative charges were framed or might have been framed.

It is next contended that the Sessions Judge omitted to state reasons for finding the petitioner guilty under section 411 of the Penal Code. It is to be regretted that the Judge, who discussed the evidence as to the alleged theft in paras. 17 to 28 of his judg-

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ment, briefly disposed of the alternative charge in a short paragraph. But the finding which he has recorded in paragraph 17 and the discussion of the evidence by the Magistrate as to the exhibits D, J and IV are sufficient to prove that the petitioner acted in collusion with Giri Gowda, with the intention of causing wrongful loss to Government.

1904.

RAMA SETTY.

The petition for revision is dismissed.

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## REVISIONAL CRIMINAL.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

IN CRIMINAL REVISION PETITION NO. 79.

1904.
January 20.

NANJA CHARI, PETITIONER.

*v.*

GOVERNMENT.

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IN CRIMINAL REVISION PETITION NO. 81.

HERAJI VENKATRAMANA CHARI, PETITIONER.

*v.*

GOVERNMENT.

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IN CRIMINAL REVISION PETITION NO. 87.

PUTTA THIMMAY GOWDA, PETITIONER.

*v.*

KRISHNA RAO & 5 OTHERS, COUNTER-PETITIONERS.*

*Criminal Procedure Code, section 195—Sanction to prosecute—Order granting it—Appeal—Court entertaining it.*

Orders giving or refusing sanction to prosecute under section 195, Criminal Procedure Code, are appealable and as appeals from the Court of 1st Class Magistrate of Hassan lie to the Court of the Sessions Judge at Mysore, the Petitioners must apply to that Court.

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*Criminal Revision Petitions Nos. 79, 81 and 87 of 1903-04, against the orders of the Treasury Assistant Commissioner and 1st Class Magistrate of Hassan in Criminal Mis. Cases Nos. 82 and 81 of 1903-04 and Criminal Mis. Case No. 55 of 1902-03.

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1904.

NANJA CHARI v. GOVERNMENT.

Mr. *B. Nagappa* for petitioners.

Mr. *S. Ramaswami Iyer* for the Government.

Mr. *L. Sreenivasa Iyengar* for the counter-petitioners in Criminal Revision Petition No. 87.

ORDER – In two of these cases the Treasury Assistant Commissioner and 1st Class Magistrate at Hassan granted sanction to prosecute the petitioners for giving false evidence; and in the third case he declined to grant sanction for prosecuting the Counter-Petitioners. The Petitioners have applied for revision of the orders.

Section 195 of the Criminal Procedure Code enacts that "any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate, and that every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie." Inasmuch as appeals from the Court of the 1st Class Magistrate lie to the Court of the Sessions Judge at Mysore, we are of opinion that the Petitioners must apply to that Court under the above section. The petitions are rejected.

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## REVISIONAL CRIMINAL

1904. February 6.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge.*

ABDUL RAHIM, PETITIONER (ACCUSED).

*v.*

GOVERNMENT.*

*Mysore Mines Regulation, section 8—Unlawful possession—Mining material—Presumption.*

The petitioner having been found in possession of 80 pink stearine candles with the Mysore Company's wick and 6 candle ends with the Oorigam Company's wick, without legal permit, the Special Magistrate, Kolar Gold Fields, convicted him under section 8 of the Mining Regulation for being in unlawful possession of mining material. On Revision it was

*Held*, that, the exclusive possession was not proved by the prosecution witnesses, and therefore, the conviction was quashed.

* Criminal Revision Petition No. 55 of 1903-04 against the order of the Assistant Commissioner and 1st Class Magistrate, Kolar Gold Fields, in Criminal Case No. 96 of 1903-04.

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*Empress v. Malhari, I. L. R,* 6 *Bombay,* 731, *followed.*

1904.

ABDUL RAHIM *v.* GOVERNMENT.

Mr. *G. W. Hoover* for the petitioner.

Mr. *S. Ramaswami Iyer* for the Government.

ORDER—The petitioner was convicted of being in unlawful possession of mining material and sentenced to pay a fine of Rs. 20.

The mining materials, *viz.*, 36 candles, were found in the accused's shop. The accused is a tailor in Bowringpet who owns six or seven sewing machines and employs a number of tailors. Prosecution second witness says :—"Accused's workmen five or six in number work in the shop. They work the machines. They do not sleep in the shop. Nor does the accused. These men work there whether the accused is absent or present. The accused is a respectable man. I have known him ten years. On the day of the search, there were four or five workmen in the shop with the accused. All of them were called out by the Police. Accused locks the shop at night. I don't know who keeps the key." Tho third witness, one of the Policemen, who made the search, states that "the accused was seated on the ground cutting cloth. Three men were working sewing machines. We called them out and sent for Panchayathdars. On the stand on which were clothes and bundles of thread, a bundle in a bag was found which I took and found 30 mine candles. In a drawer near where the accused was seated and where the accused keeps cash, were 4 small pieces of mine candle." The Police Inspector deposes that "the shop is one long room. At the end of the room, shelves have been erected on three sides. The top shelf was shown me as the place where the 30 candles were found. That shelf was visible from outside. The box in which the 4 candles were found was not locked."

As the evidence shows that the candles were found in an open shelf and in an open box in the shop in which the accused and his servants work during the day and which is locked at night, and in which the servants continue to work even during the absence of the accused from the town, the question arises whether he was in possession of the candles. The Judgment which is reported in I. L. R., 6 Bom. 733 and in which the question of dishonest possession is discussed may be quoted. "It is admitted that there is no evidence against the appellant except the circumstance that stolen property was found concealed in a loft in his house. It is to be

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1904.

ABDUL RAHIM v. GOVERNMENT.

observed that the attention of the Jury was not directed to the necessity of their being satisfied that the possession of the stolen property was clearly traced to the accused, and that it could not have been placed where it was found by any other member of the accused's household. The following observations by Mr. Best in his work on evidence are worthy of consideration :—"But in order to raise this presumption legitimately, the possession of stolen property should be *exclusive*. . . . . If the articles stolen were only found lying in a house or room in which he lived jointly with others equally capable with himself of having committed the theft or in an open box to which others had access, no definite presumption of guilt could be made. An exemption has been said to exist where the accused is the occupier of the house in which the stolen property is found, who, it is argued, must be presumed to have such control over it as to prevent anything coming in or being taken out without his sanction. As a foundation for *civil* responsibility this reasoning may be correct; but to conclude the master of a house guilty of *felony*, or the presumption that the stolen goods found in the house were placed there by him or with his connivance is certainly treading on the very verge of artificial conviction."

The facts proved by the Prosecution witnesses are insufficient to prove that the candles were found in accused's exclusive possession; and they are not inconsistent with the hypothesis that some one or other of the workmen had kept the candles in the shop. The conviction is quashed and the fine, if levied, will be refunded to petitioner.

## REVISIONAL CRIMINAL.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge.*

1904. February 8.

*In re.* Y. SREENIVASA IYENGAR.*

*Mukhtar—Right to appear for complainant—Magistrate refusing permission—Illegal—Chief Court Proceedings, dated 9th December 1897.*

The petitioner was practising as a Mukhtar in some Criminal Courts of the Mysore District. In a certain case the Amildar Magistrate of Yellandur refused to permit the petitioner to appear for the complainant and rejected the

*Criminal Revision Petition No. 115 of 1903-04, against the order of the Amildar and 3rd Class Magistrate of Yellandur in Criminal Case No. 35 of 1903-04, on the Vakalat produced in the above said case.

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Vakalatnama filed by him on the ground that the concession of allowing any person to appear for the accused could not be extended to the petitioner as he wanted to appear for the complainant. Against this order the petitioner preferred a Revision Petition to the Chief Court.

1904.

Y. SREENIVASA IYENGAR.

*Held*, that the opinion of the Magistrate that he had no power to permit any person other than an authorized person to act for the prosecution was erroneous.

Mr. *J. C. S. Lawrance* for the petitioner.

ORDER—The Magistrate is of opinion that he has no power to permit any person other than an authorized pleader to act for the prosecution. The opinion is erroneous. An extract from the Proceedings of the Chief Court, dated 9th December 1897, will be forwarded to the Subordinate Magistrate through the District Magistrate.

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## REVISIONAL CRIMINAL.

*Before Mr. Justice A. Rangaswami Iyengar.*

1904.
March 14

RUDRAPPA, PETITIONER, (COMPLAINANT).

*v.*

KUNNA, COUNTER-PETITIONER, (ACCUSED).*

*Breach of Contract Act—Act XIII of 1859—Service for agricultural purposes for a definite period.*

The accused entered into an agreement with the complainant whereby, in consideration of the receipt in advance of a sum of Rs. 50, the former bound himself to work under the latter as an agricultural labourer for 3 years on a payment of Rs. 18 per annum besides food. The accused having failed to perform his part of the contract, the complainant charged him under section 2 of Act XIII of 1859. The Magistrate being of opinion that cases in which advances were made for agricultural purposes did not fall under the Act, dismissed the complaint. Against this order the complainant preferred a Revision Petition to the Chief Court.

*Held*, that the Magistrate was wrong in considering that the document did not come under the Act.

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* Criminal Revision Petition No. 109 of 1903-04, against the order of the Assistant Commissioner and 1st Class Magistrate, Bangalore Range, in Criminal Miscellaneous Case No. 2 of 1903-04.



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RUDRAPPA v. KUNNA.

A contract for rendering agricultural labour for a definite period has been held valid and 3 years is not too long or objectionable.

*Balagai Ninga in re. Hemajee Row's Digest,* 107 *followed.*

*Empress* v. *Bhagvan Bhivsan, I. L. R.,* 7, *Bombay* 379 *distinguished.*

Mr. *T. Appu Rao* for the petitioner.

Mr. *Subraya Modaliar* for the counter-petitioner.

ORDER—The contract is dated 14th July 1902, and is to the effect that the accused having received Rs. 50 has undertaken to work under complainant as an agricultural laborer for 3 years on a payment of Rs. 18 per annum besides food. The complaint was filed in July 1903 and stated that the accused had run away after working for about 2 or 3 months.

Three witnesses were examined for the prosecution, including the complainant, and 2 swear to the due execution of the document and payment of Rs. 50 in cash. The 3rd, a Lawyer's gumasta and writer, deposes that the document was duly executed but denies that money was paid. But as he is the gumasta of the Advocate, who has appeared to defend the accused, it is easy to see how interested he is in the accused and how much his statements must be discounted. The accused denies execution of any document of any kind but has not examined any witnesses or given any reason for discrediting the prosecution. The Magistrate has grossly erred in holding that, under the circumstances, the payment of consideration was not proved by satisfactory evidence.

He is also wrong in considering that the document did not come under the Act—contract for rendering agricultural labor for a definite period—has been held valid and 3 years is not too long or objectionable (*vide* Revision Case No. 486 of 1891, page 107 Hemaji Row's Digest pp. 472, 475—6 and 478, Weir's Digest). The case quoted at 7 B. 379 is no precedent in this case as the contract there provided for "service for agricultural and other purposes."

The order of the Magistrate is accordingly set aside and the case is returned to the Magistrate for passing such orders as may appear suitable under the circumstances of the case.

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## REVISIONAL CRIMINAL.

*Before Mr. Justice A. Rangaswami Iyengar.*
*and Mr. Justice H. V. Nanjundayya.*

LINGAIYA AND ANOTHER, PETITIONERS, (ACCUSED).

1904.
April 4.

*v.*

LINGAIYA, COUNTER-PETITIONER, (COMPLAINANT).*

*Criminal Procedure Code, section 145—Order by Magistrate under the section—Chief Court setting it aside—Effect of Chief Court's order—Restoration of immoveable property—Mode of help—Disobedience of Magistrate's order—Indian Penal Code, section 188.*

A Magistrate ordered under section 145, Criminal Procedure Code, that petitioner should remain in possession of certain lands. This order was set aside in revision by the Chief Court and afterwards the counter-petitioner applied to the Magistrate for restoration of possession. The Magistrate rejected the petition saying that the effect of the order of the Chief Court was to leave the case in *statu quo* and that there was no provision to order the re-delivery of property and the District Magistrate also concurred in this opinion. The petitioner preferred a Revision Petition to the Chief Court.

*Held, per* Justice RANGASWAMI IYENGAR—that there was no provision for delivery of immoveable property to any individual in the Criminal Procedure Code except that in section 522, which applied only to cases where dispossession had taken place in consequence of an offence accompanied by criminal force.

*Also,* that as disobedience of an order passed by a Magistrate under section 145, Criminal Procedure Code would be punishable under section 188, Indian Penal Code, it was a question for the Magistrate to decide whether the continuance of the said petitioner in possession of the property in opposition to the order of this Court did not amount to an offence under section 188, Indian Penal Code.

*Goluck Chandra Pal* v. *Kali Charan De, I. L. R.* 13 *Calcutta,* 175, *followed.*

*Tarim Charan Chowdhry* v. *Anulya Ratan Roy, I. L. R.,* 20 *Calcutta,* 867, *referred to.*

*Held, per* Justice NANJUNDAYYA—that as section 145 required the Magistrate only to decide which of the parties was in actual possession, there could not logically be any provision in the Code to enforce such order except by prohibiting any interference with such possession. The disobedience of the

* Criminal Revision Petition No. 96 of 1903-04, against the order passed by the District Magistrate, Mysore, in Criminal Mis. Case No. 4 of 1903-04, confirming the order of the Special Sub-Division Officer and 1st Class Magistrate of Chamarajanagar in Criminal Mis. Case No. 49 of 1902-03.

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1904. Magistrate's order forbidding all disturbance of possession would be punishable and that seemed to be all that was necessary.

LINGAIYA v. LINGAIYA

Messrs. *B. Nanjundappa and M. Krishna Rao* for the petitioners.

Mr. *C. Krishna Murti* for the counter-petitioner.

ORDER—BY MR. JUSTICE A. RANGASWAMY IYENGAR.—The facts of this case are as follows :—In Criminal Case No. $\frac{35}{1}$ of 1901-02 on the file of the 1st Class Magistrate, Chamarajnagar Sub-Division, the Magistrate ordered, under section 145, Criminal Procedure Code, that petitioner Lingaiya shall remain in possession of certain lands. This order was set aside in revision by this Court in Criminal Revision Petition No. 16 of 1902-03 on 4th October 1902, on the ground that no necessity had been made out for Magistrate's interference. The counter-petitioner then applied on 31st July 1903 to the said Magistrate for restoration of their possession. The Magistrate rejected the petition, saying that the effect of the order of the Chief Court was to leave the case in *Statu Quo* and that there was no provision to re-deliver the property.

They then petitioned the District Magistrate who concurred with the opinion of the Sub-Division Magistrate. They have presented this petition to this Court.

As observed by the Sub-Division Magistrate, the effect of the order of this Court is to set aside the order of the Magistrate, declaring that the petitioner before him was in possession and as such entitled to possession, and its legal consequence would be to leave the parties as they were before the Magistrate initiated his proceedings.

It must be admitted that there is no provision for delivery of immoveable property to any individual in the Criminal Procedure Code except that, in section 522, which applies only to cases where dispossession has taken place in consequence of an offence accompanied by criminal force. Consequently, there is no provision in the Code to give effect even to an original order of a Magistrate under section 145. But it has been held that disobedience of an order passed by a Magistrate under this section would be punishable under section 188, I. P. C. (*See* 13 Cal. 175). So it is a question for the Magistrates to decide whether the continuance of the said petitioner in possession of the property in opposition to the

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order of this Court does not amount to an offence under section 188, I. P. C. It may also be pointed out that, even if the former case be closed under section 145, there may not be fresh reason for taking action under the same section on further application of the petitioners —*vide* 20 Cal. 867.

1904.

LINGAIYA *v.* LINGAIYA

With these remarks, the petition for revision will be struck off.

BY MR. Justice H. V. NANJUNDAYYA.—I concur. I wish only to add that, as section 145 requires the Magistrate only to decide which of the parties is in *actual* possession, there could not logically be any provision in the Code to enforce such order, except by prohibiting any interference with such possession. The disobedience of the Magistrate's order forbidding all disturbance of possession would be punishable; and that seems to be all that is necessary. It has also to be observed that no order has actually been passed in favour of this petitioner under section 145.

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## REVISIONAL CRIMINAL.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge.*

1904.
April 11.

ERIAH, PETITIONER, (COUNTER-PETITIONER).

*v.*

ERAMMA, COUNTER-PETITIONER, (PETITIONER).*

*Criminal Procedure Code, section* 488—*Maintenance—Sufficient means.*

*Held*, that the point whether the petitioner had sufficient means as laid down in section 488 to give separate maintenance, did not receive adequate consideration in the hands of the Magistrate, and therefore his present order directing the petitioner to pay Rs. 24 per annum to the counter-petitioner was set aside.

Messrs. *L. Sreenivasa Iyengar* and *C. S. Doraswami Iyer* for the Petitioner.

Mr. *K. T. Narasimha Iyengar* for the counter-petitioner.

The facts are clear from the following

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* Criminal Revision Petition No. 88 of 1903-04 against the order passed by the 1st General Assistant Commissioner and 1st Class Magistrate of Tumkur in Criminal Miscellaneous Case No. 4 of 1903-04.

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1904.

ERIAH v. ERAMMA

ORDER—The Magistrate has ordered the petitioner Eriah to pay Rs. 24 per annum for the maintenance of his wife Eramma. The petitioner has applied for revision of the order.

I concur with the Magistrate in finding that the petitioner failed to prove that the wife had committed adultery.

There is some force in petitioner's contention that he is too poor to pay separate maintenance to his wife. The evidence shows that petitioner is possessed of only two dry lands for which he pays Rs. 7-8 as assessment. It appears doubtful whether the produce of the land is sufficient to maintain him and the members of his family. Section 488 empowers a Magistrate to make an order for maintenance if "a person having sufficient means" neglects or refuses to maintain his wife. Since this point does not appear to have received adequate consideration, the order is set aside and the Magistrate is directed to pass a fresh order after receiving additional evidence, if necessary.

## REVISIONAL CRIMINAL.

1904. June 18.

*Before Mr. Justice A. Ramachandra Iyer, Chief Judge.*

SAMBU GOWDA, PETITIONER.

*v.*

NANJE GOWDA, COUNTER-PETITIONER.*

*Criminal Procedure Code, sections 145 and 146—Dispute regarding land—Order of attachment under section 146—Magistrate's powers under these sections.*

One Kale Gowda who was the pattadar of some land, died leaving a minor widow. The latter's father obtained a certificate of guardianship and took possession of all the deceased man's properties on her behalf and attempted to cultivate the land in dispute which was lying waste for several years and which belonged to the deceased man. A man named Nanje Gowda alleging that he was an undivided cousin of the deceased Kale Gowda claimed possession of the said land and applied to the Magistrate for an order under section 145 of the Criminal Procedure Code. The Magistrate being of opinion that none of the parties was in possession, passed an order of attachment under section 146, Criminal Procedure Code. Against this order the guardian of Kale Gowda's widow preferred a Revision Petition to the Chief Court.

* Criminal Revision Petition No. 131 of 1903-04, against the Proceedings of the Assistant Commissioner and 1st Class Magistrate, French Rocks, in Criminal Mis. Case No. 2 of 1903-04,

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*Held*, that upon the receipt of the report, the Magistrate acted properly in passing an order under section 145, calling upon the parties to put in statements of their repective claims;

*Also*, that there was nothing to prevent the Magistrate who found that neither party was in possession, from getting the land cultivated, in the meantime, by either party or by a stranger upon the execution of a muchilika to him.

Mr. *B. Nanjundappa* for the petitioner.

Mr. *C. Krishna Murti* for the counter-petitioner.

ORDER—This is an application for revision of an order which was passed by a 1st Class Magistrate under section 146 of the Code of Criminal Procedure.

The petitioner contends that the Magistrate had no grounds to take any action under section 145 of the Code. The Police Inspector reported that there were quarrels between the parties in regard to the land left by the deceased Kala, that now and then he received complaints about such disputes, and that the interference of a Magistrate was needed to prevent a breach of the peace. Upon the receipt of the report, the Magistrate acted properly in passing an order under section 145, calling upon the parties to put in statements of their respective claims.

It is next contended that the Magistrate ought not to have attached the land under section 146 since it was admitted by the parties that the land had not been cultivated for more than a year owing to their disputes, the Magistrate was not wrong in finding that neither party was in possession.

I do not think that the land must lie waste until the dispute is decided by a Civil Court, since there is nothing to prevent the Magistrate from getting it cultivated in the meantime by either party or by a stranger upon the execution of a muchilika to him.

The petitioner having failed to show good reason for disturbing the Magistrate's order, I dismiss the petition for revision.



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# APPELLATE CIVIL.

*Before Mr. Justice A. Rangaswami Iyengar and Mr. Justice H. V. Nanjundayya.*

1904. July 25.

ABDUL AMID KHAN ALIAS OOSMAN KHAN, APPELLANT, (PLAINTIFF).

*v.*

VENKATARAMANAPPA, RESPONDENT, (DEFENDANT).*

*Land Revenue Code, section 193—Mohatarfa—House-tax—Arrears—Sale of house by Revenue Authorities therefor—Jurisdiction—Validity—Irregularities in conducting or publishing the sale—Remedies of the defaulter—Chief Commissioner's Notification No. 265 of 28th September, 1860.*

The defendant's house was sold in a Revenue sale for arrears of mohatarfa tax payable thereon and the plaintiff became the purchaser. After the purchase, the plaintiff applied to the Deputy Commissioner for possession of the house but as the house had been locked by the defendant, the plaintiff was referred to a Civil Court. Thereupon the plaintiff filed the present suit for recovery of possession of the house and the kandayam paid by him to Government. The defendant contended that the sale was invalid as all the formalities required by law had not been observed.

*Held*, that section 193 of the Revenue Code was wide enough to include the present case, as mohatarfa house tax was a sum leviable as assessment under the terms of the Chief Commissioner's Notification No. 265 of 28th September 1860 which had the force of law and therefore the sale of the defendant's house by the Revenue Department for arrears of mohatarfa tax was valid.

*Also*, that if there were irregularities such as a large sum than was legally due being mentioned, or some formality such as not declaring the occupancy forfeited under section 159 of the Revenue Code, they did not affect the jurisdiction or vitiate the sale and render it void and that the sale could be set aside only by appeal or a regular suit for the purpose.

SUIT for possession of a house and recovery of kandayam paid to Government. The Munsiff of Kolar passed a decree in favour of plaintiff. The District Judge, in appeal, reversed the Munsiff's decree and dismissed the plaintiff's suit.

The plaintiff preferred this Second Appeal.

* Second Appeal No. 39 of 1903-04, against the decree of the District Judge of Bangalore in Appeal No. 11 of 1902-03, reversing the decree of the Munsiff of Kolar in Original Suit No. 632 of 1901-02.

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1904.

ABDUL AMID KHAN v. VENKATARAMANAPPA.

Mr. *S. N. Ramaswami Iyengar* for the appellant.

Mr. *D. Venkataramayya* for the respondent.

JUDGMENT—A house belonging to the defendant was sold for arrears of the mohatarfa tax due thereon and purchased by the plaintiff. He obtained nominal possession of it (Exhibit F) at the time of the sale: but as the defendant had locked it up, he asked the Deputy Commissioner to get it opened and made over to him (Exhibit B). He was however informed that he should recover it through a proper Court.

It is admitted that the defendant failed in his appeal to the Deputy Commissioner to get the sale set aside (exhibit G): but in the order, that Officer expressed the opinion that the amount of the arrears stated in the sale proclamation was wrong and that the confirmation of the sale an error. This seems to have encouraged the defendant to resist the claim.

Unless the sale by the Revenue Department was altogether void and of no effect, the defendant cannot now succeed in his contention. If there were irregularities, he ought to have appealed to Government; and if there was any fraud or other circumstance giving jurisdiction to the Civil Courts, he ought to have filed a suit within the period of limitation.

Though the question of want of jurisdiction was not urged by the respondent, we may observe that there is no clear express order (as far as we have been able to ascertain) laying down whether and in what manner mohatarfa revenue due to Government has to be realised. The same procedure as for the realisation of land revenue has, we understand, been resorted to all along. We had some doubt whether this sale should be allowed to stand as valid in the absence of an express authority given by law. After some hesitation, we have arrived at the conclusion that section 193 of the Revenue Code is wide enough to include the case as mohatarfa house tax is a sum leviable as assessment under the terms of the Chief Commissioner's Notification No. 265 dated 28th September 1860 which has the force of law.

Both the Courts have found that there were arrears. If there were irregularities such as a larger sum than was legally due being mentioned, or some formality such as not declaring the occupancy

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1904.

ABDUL AMID KHAN v. VENKATARAMANAPPA.

forfeited under section 159 of the Revenue Code, they do not affect the jurisdiction, and the sale could be set aside only by appeal or a regular suit for the purpose. We do not consider that the learned District Judge is right in holding that the absence of a declaration of forfeiture in the case of a house sold for arrears of tax due thereon, vitiates the sale itself and renders it void. The utmost that can be said is that the purchaser will obtain only the rights of the defaulters in such house in that case.

The last objection taken by the Lower Appellate Court is that the Deputy Commissioner should have put him in possession under section 187 of the Revenue Code. The plaintiff seems to have obtained nominal possession, but that was before the confirmation of the sale. We cannot however find any authority to hold that the plaintiff should, on account of any error of the Deputy Commissioner to exercise the power given by the Code, be deprived of his right to recover the house from a party who is wrongfully holding possession.

The result is that the decree of the Lower Appellate Court should be reversed, and the Munsiff's decree restored with costs throughout.

## APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice A. E. Staley, Chief Judge,*
*Mr. Justice A. Rangaswami Iyengar and*
*Mr. Justice H. V. Nanjundayya.*

1904. February 19. July 30.

KRISHNA BHATTA, APPELLANT, (DEFENDANT).

*v.*

VENCATACHALA BHATTA, RESPONDENT, (PLAINTIFF).*

*Contribution suit based on an express contract—Variance between pleadings and proof—Relief to plaintiff on general principles—Decree when permissible on a different title but for similar relief—Procedure—Indian Contract Act, sections 70, 73.*

One co-sharer of a Kodigi Inam spent some money for the repairs of a tank for the maintenance of which he and the defendant were jointly liable and sued the latter for his share of the cost, alleging that the defendant had

* Second Appeal No. 118 of 1902-03, against the decree of the Subordinate Judge of Bangalore in Appeal No. 2 of 1902-03, reversing the decree of the Court of the Munsiff of Kolar in O. S. No, 250 of 1901-02.

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1904.

KRISHNA BHATTA v. VENKATA-CHALA BHATTA.

expressly agreed to pay. But the plaintiff failed to prove the special agreement. The question for consideration was whether the plaintiff was entitled to succeed on the general liability of the defendant to contribute when he had sued on a special agreement in his plaint.

*Held*, (Justice NANJUNDAYYA *dissenting*) that in order to save litigation the plaintiff might get a decree on a different title for similar relief provided that all the issues bearing on both titles were raised in the original Court and provided that the determinations in the cause could be founded upon a case either to be found in the pleadings or involved in and consistent with the case made thereby and that the equities and ground of relief originally alleged and pleaded by the plaintiff should not be departed from.

*Eshenchunder Singh* v. *Shamachurn Bhutto*, 11 M. I. A., 7; *Nurul Hossein* v. *Sheosahai Lal* 20 Cal., 1 (P. C.); *Parashram Valad Bapu* v. *Miraji Valad Subhana*, 20 Bom., 569, approved.

*Also*, that as all matters necessary to render defendant liable on the implied contract had been sufficiently dealt with in the findings on the issues on the express contract, the plaintiff was entitled to a decree against the defendant.

CONTRIBUTION SUIT. The Munsiff of Kolar dismissed the plaintiff's suit on the ground that the agreement relied upon by him was not proved. The Sub Judge of Bangalore in appeal reversed the Lower Court's decision and passed a decree in favour of plaintiff.

The defendant preferred this Second Appeal.

Mr. *H. Krishnappa* for the appellant.

Mr. *B. Nanjundappa* for the respondent.

This Second Appeal first came on for disposal before a Bench consisting of Mr. Justice Rangaswami Iyengar and Mr. Justice Nanjundayya and as there was some difference of opinion between their Honours, it came on again for hearing before the Full Bench constituted as above.

JUDGMENT.—THE CHIEF JUDGE.—The plaintiff respondent sued the defendant appellant alleging that the defendant had made a particular agreement with the plaintiff to contribute a quota of the cost of repairs to a tank for the maintenance of which they were jointly liable.

Both Courts have held that the plaintiff has failed to prove the special agreement. The question is whether the plaintiff is entitled

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to succeed on the general liability of the defendant to contribute when he has not sued thereon in his plaint.

The general principles to be observed in deciding a case like this are these. A plaintiff is not as a rule entitled to a decree upon a title other than that on which he relies in the plaint. But in order to save litigation he may get a decree on a different title for similar relief provided that all the issues bearing on both titles were raised and tried in the original Court and provided the determinations in the cause should be founded upon a case either to be found in the pleadings or involved in and consistent with the case made thereby and that the equities and ground of relief originally alleged and pleaded by the plaintiff should not be departed from (11 M. I. A., 7 I. L. R., 20 Cal., p. 1 (P. C.,) I. L. R., 22 Cal., p. 589, I. L. R., 20 Bom., p. 569 and the rulings referred to therein).

In the present suit the issues raised were whether the plaintiff executed the repairs in pursuance of and in accordance with the terms of an agreement between the plaintiff and the defendant as alleged in the plaint? Whether the defendant was exonerated from paying his share to the plaintiff by a request of Government not to execute the repairs? What have the repairs done by the plaintiff cost him?

Whether the plaintiff relies on the express contract set forth in the plaint or the implied contract to repair, the plaintiff is entitled to recover damages on the same principle (section 70, Chapter V and section 73, Contract Act 1872). The defendant has had the benefit of the repairs done by plaintiff to which the defendant was bound to contribute. Since the defendant has not discharged the obligation the plaintiff is entitled to receive the same compensation as if defendant had contracted to pay the compensation and had broken his contract. It is thus immaterial whether plaintiff relies on the contract alleged in the plaint or on his implied contract (section 73 Contract Act). It is not necessary to make the defendant liable that the plaintiff should have given the defendant notice to execute the repairs and a reasonable time to execute them himself. No such notice or opportunity are required by law. What the plaintiff would have to prove on the implied contract would be that he paid for defendant's use or benefit in discharge of a lawful joint liability of the defendant and himself. (Roscoe's Nisi Prius Evidence, Volume I p. 506 *et seq.* Addison on Contracts pp. 1033, 1034 *et seq.*) All

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the matters necessary to render defendant liable on the implied contract have been sufficiently dealt with in the findings on the issues on the express contract.

I am therefore of opinion that on the principles pointed out at the beginning of this judgment, the plaintiff is entitled to the decree awarded by the learned Subordinate Judge and the appeal should be dismissed with costs.

Mr. Justice A. RANGASWAMI IYENGAR.—I concur.

Mr. Justice H. V. NANJUNDAYYA.—I adhere to my former judgment. It seems to me that when the plaintiff set up an express contract, he virtually abandoned any right he may have under an implied one. In fact, there is no necessity to raise any implication at all when there is an express agreement between the parties. By passing a decree on this basis, the Court would be making out for the plaintiff a case which he did not set up after finding that the case that he did set up was absolutely false.

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## APPELLATE CIVIL.

*Before Mr. Justice A. Rangaswami Iyengar and Mr. Justice H. V. Nanjundayya.*

GULAM HUSSAIN, APPELLANT, (PLAINTIFF).

1904. August 8.

*v.*

GOUS MEIYA, RESPONDENT, (2ND DEFENDANT).*

*Decree—Assignment—Effect—Payment of debt to assignor alleged subsequent thereto—Judgment-debtor paying with notice of assignment—Liability of assignor and Judgment-debtor—Damages—Cause of action.*

A decree-holder after assigning his decree to another colluded with the judgment-debtor and reported satisfaction of decree to the Court. Thereupon, the assignee sued both his assignor and the judgment-debtor for the recovery of the consideration paid by him for the assignment. The judgment-debtor who was the 2nd defendant in the case contended that the plaintiff had no cause of action against him.

* Second Appeal No. 48 of 1903-04, against the decree of the District Judge of Mysore in Appeal No. 186 of 1902-03, modifying the decree of the Court of the Munsiff of Hole-Narsipur in O. S. No. 256 of 1900-01.

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*Held*, that by the written assignment and payment of consideration to the assignor, the title of the assignee was complete though he might not be entitled to execute the decree until the Court recognized the transfer; and that the opinion of the District Judge that the plaintiff had no cause of action against the 2nd defendant was not correct.

*Dwar Buksh Sirkar* v. *Fatik Jali*, I. L. R., 26 Cal., 250 followed.

SUIT for recovery of money by way of damages. The plaintiff was the assignee of a decree from the 1st defendant and the 2nd defendant was the judgment-debtor. The Munsiff of Hole-Narsipur passed a decree against both the defendants. The District Judge, in appeal, modified the Munsiff's decree and dismissed the suit as against the 2nd defendant on the ground that the plaintiff had no cause of action against him.

The plaintiff preferred this Second Appeal.

*Messrs. L Sreenivasa Iyengar* and *C. S. Doraswami Iyer* for the appellant.

*Mr. M. B. Varadaraja Iyengar* for the respondent.

JUDGMENT—The questions for determination in this second appeal are, whether the assignee of a decree, can recover, by a separate suit, the amount paid by him as consideration for such assignment as damages from the assignor as well as the judgment-debtor on the grounds that the latter had notice of such assignment and yet got the assignor falsely to report satisfaction to the Court. By the written assignment and payment of consideration to the assignor, the title of the assignee is complete though he may not be entitled to execute the decree until the Court recognizes the transfer. (*Dwar Buksh Sirkar* v. *Fatik Jali*, 26 C, 250, p. 253). If the judgment-debtor had paid the money to the decree-holder, without notice of the transfer, the payment, would, of course, be good and he would not again, be held liable to the transferee. But if he paid the money with notice of the transfer, he must be held to have paid it to a person who had no right to receive the money and the assignee has the equitable right to proceed against him for the amount of the decree. We are, therefore, unable to agree in the opinion of the District Judge that the plaintiff has no cause of action against the 2nd defendant. Both the lower courts have found that the assignment is bonafide and

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supported by consideration. The District Judge has not recorded a finding as to whether the 2nd defendant had notice of the transfer and whether he really satisfied the decree. But it is unnecessary to send the case down to him for recording his findings on these questions. The decree is dated 21st December 1896. The deed of assignment was executed and registered on 19th August 1897. The 2nd defendant is stated to have entered into an arrangement for satisfaction of the decree on 1st September 1897 or within 12 days after the assignment and gone with 1st defendant to the Munsiff's Court at Hole-Narsipur the very next day to have satisfaction entered. The plaintiff, 1st defendant and witnesses are permanent residents of Chenroyapatam, the 2nd defendant visiting the place occasionally and the 1st and 2nd defendants are proved to have been on inimical terms. There is thus very strong presumptive evidence to conclude that the 2nd defendant must have entered into terms with first defendant only after he learnt of the assignment. But even if we suppose otherwise, the evidence as to the adjustment of the decree by payment of Rs. 350-15-0 (as recited in the receipt), is unsatisfactory. The 2nd defendant has deposed that he paid the decree amount to her and in cross-examination, corrected himself, saying that he consented to pay only Rs. 300 which he did and that he did not know why the receipt was drawn up for Rs. 350-15-0. The first defendant first said that she received Rs. 300 and excused Rs. 250. She then stated that she owed Rs. 50 and odd to the Toddy Inspector, which she gave him and took the remaining Rs. 300, the 2nd defendant having paid her Rs. 350 and odd. The Toddy Inspector alone has been examined as the 3rd witness and his evidence is to the effect that the 2nd defendant paid Rs. 300 to the first defendant in satisfaction of the decree and that 1st defendant did not pay him any money on that day. In answer to the Court, the witness said that Rs.50-15-0 was held in deposit as being the amount payable to Court for costs. But the amount payable for institution fee was only Rs.28 and odd and not Rs. 50-15-0. No witnesses have been examined to the alleged panchayet at which this adjustment was effected and the 2nd defendant has not explained how he was able to get together so much money to pay the first defendant in satisfaction of the decree. The first defendant admits that plaintiff had advanced the funds for filing the suit. Is it likely that she would have entered into any adjustment

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with 2nd defendant without consulting him and would she have remitted such a large sum as 200 or 250 Rs., seeing that 2nd defendant is admitted to own lands in the Chenarayapatna Taluk? We agree, therefore, with the Munsiff in holding that the alleged adjustment and satisfaction is false and got up in collusion between the defendants to defraud the plaintiff.

Even if the 2nd defendant had really no notice of the assignment he is still liable to pay the plaintiff's damages on the ground that the alleged satisfaction is nominal and collusive.

The next question is what is the amount payable to plaintiff in damages. His actual loss is only the amount he paid for the assignment which is Rs. 400 and the interest on Rs. 400 at 6 per cent. from date of assignment. In reversal of the decision of the lower Appellate Court, the plaintiff will be given a decree for the said amount with interest at 6 per cent. from date of assignment, and proportionate costs throughout against both the defendants.

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## APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr Justice A. Rangaswami Iyengar.*

1904. August 22.

K. SWAMYROYA CHAR, APPELLANT, (PLAINTIFF).

*v.*

N. GOPALAPPA, RESPONDENT, (2ND DEFENDANT).*

*Indian Limitation Act, XV of* 1877, *section* 21—*Surety—Payment towards principal and interest by debtor only—Endorsement of payments in surety's handwriting—Effect on surety's liability—Limitation.*

In a suit for the recovery of Rs. 300 due under an unregistered hypothecation bond executed by the 1st defendant, a person who had stood security for the repayment of the debt was added as 2nd defendant in the suit. The latter pleaded that the suit was time-barred as against him, on the ground that he had not himself made any payment within the period of limitation.

*Held*, that it could not be said that the mere act of the 2nd defendant's writing the endorsement or attesting some of the endorsements as a witness

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* Second Appeal No. 75 of 1903-04, against the decree of the District Judge of Shimoga in Appeal No. 291 of 1902-03, reversing the decree of the Munsiff of Honnalli in Original Suit No. 329 of 1902-03.

could amount to an act calculated to affect him with liability as a payer of interest and therefore the District Judge was right in holding that the claim was barred as against the 2nd defendant.

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SUIT for recovery of money due on an unregistered hypothecation bond dated 13th February 1890. Some payments made by the 1st defendant who was the principal debtor, towards principal and interest, were endorsed on the bond by the 2nd defendant who was only a surety. The question for consideration was whether the mere act on the part of the surety of endorsing the payments was enough to keep the claim of the creditor alive as against him. The Munsiff of Honnali passed a decree making both the defendants liable. In appeal by the 2nd defendant, the District Judge of Shimoga reversed the Lower Court's decree and dismissed the suit as against him.

The plaintiff preferred this Second Appeal.

Mr. *J. C. S. Lawrance* for the appellant.

*Mr. L. Sreenivasa Iyengar* for the respondent.

JUDGMENT—The plaintiff sued 1st defendant as principal and the 2nd defendant as surety for 1st defendant for recovery of money due on an unregistered deed of hypothecation. The 2nd defendant pleaded that he was not liable, because the plaintiff failed to get the deed of hypothecation registered and that the claim as against himself was barred. The Munsiff gave plaintiff a decree against both defendants. On appeal the District Judge of Shimoga reversed the Munsiff's decree as against the 2nd defendant holding that the claim against him was barred and that the 2nd defendant could not be made liable as the omission of the plaintiff to get the document registered deprived the 2nd defendant of the benefit of the security furnished by the hypothecation.

The plaintiff has appealed from this decision of the District Judge. The document may be said to consist of two parts. In the first part the 1st defendant admits the borrowing of money, undertakes to repay the same with interest and hypothecates his house and some cattle. After the signature by the 1st defendant and attestation of witnesses have been made, the 2nd defendant executes the second part promising to repay the loan if it be not recovered from the 1st defendant or his hypothecated property. The docu-

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ment is not registered and the payments towards interest and principal endorsed on the bond are all signed only by the 1st defendant. They are however admitted to be in the handwriting of the 2nd defendant and some have been attested by him and others as witnesses.

The first question for consideration is whether the payments for interest and principal under the said circumstances can be considered to keep the claim alive as against the 2nd defendant. It cannot be contended that the 2nd defendant made the payments jointly with 1st defendant or that he authorized the 1st defendant to make the same on his behalf. There is no business relation between the 1st and 2nd defendants which can constitute them as members of a partnership or at least as agents for one another in this transaction. The plaintiff has deposed that "the 1st defendant made payments. I got the endorsements written by the 2nd defendant, because he was surety. He said he had signed them. I believed him. I don't know Kanarese." Thus he does not contend that the payments were made jointly or that 1st defendant could be considered as his agent in this matter. He says that he believed him to sign the endorsements but he has not pleaded that 2nd defendant was guilty of fraud in this respect or adduced any proof of it. At the most it can be argued that the 2nd defendant was aware of the payments and consented to their being made. Is this sufficient to prevent the claim against him being barred? Section 21 of the Limitation Act XV of 1877 provides that "nothing in sections 19 and 20 renders one of several joint contractors . . . chargeable by reason only . . . . of a payment made by . . . . . any other or others of them." In a similar case arising under sections 14, 19 and 20 Victoria c. 97 (Mercantile Law Amendment Act 1856) it was held that payments by one debtor with the knowledge and consent of the joint debtor did not help to keep alive the claim against the latter. With reference to the words "by reason only" it was explained by Coleridge, J. that "in order to affect one co-debtor with the payment by the other, something must have been done, something more than mere knowledge or consent is necessary" and Lord Campbell, C. J. remarked that "the Act means payment by one *without some other act* shall not deprive the other debtor of the benefit of the Statute of Limitations." Jackson *vs.*

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Woolley, Law Reports New Series Volume XXVII p. It cannot be said that the mere act of the 2nd defendant's writing the endorsement or attesting some of the endorsements as a witness can amount to an act calculated to affect him with liability as a payer of interest.

The Court of first instance was of opinion that because the payments were made by the 1st defendant invariably in the presence of the 2nd defendant, it could be held that time was given to the principal debtor with the consent and approval of the 2nd defendant. But mere payments do not necessarily amount to grant of extension of time for payment of the amount due and they cannot have the effect of keeping alive the second defendant's liability under the Limitation Act. It must therefore be concluded that the learned District Judge was right in holding that the claim was barred as against the 2nd defendant.

The next question for consideration in this case is whether the 2nd defendant can claim the benefit of section 141 of the Contract Act. It is argued that if the document had been registered, the plaintiff would have preserved his lien upon the hypothecated house and that this security has been lost by the plaintiff without the consent of the surety, *Wulff* v. *Jay, L. R.*, 7 *Q. B.*, 756. It must be admitted that the hypothecated house was a security for this loan to the benefit of which both the plaintiff and 2nd defendant were entitled. The plaintiff had the document and could have enforced its registration. It is doubtful if the 2nd defendant could be regarded as a joint executant of the deed of hypothecation as it is framed in two parts as already explained and the 2nd defendant's undertaking at its foot must be treated as a separate document. Even if he be regarded as a joint executant of the document, can it be said that he was equally culpable with plaintiff for its non-registration and consequent loss of the security? It is however unnecessary to enter into the question of the effect of any negligence in this respect on his part on his right to claim the benefit of this section or to consider whether his subsequent conduct in assisting in writing the endorsements of payment of interest or principal amounted to a waiver of his rights under this section, as the claim is held to be barred against him.

In the result, the decision of the lower Appellate Court should be affirmed and this appeal dismissed with costs.

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# APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

1904. September 14.

RAJAGOPALACHAR, APPELLANT, (1st DEFENDANT).

*v.*

SHESHACHALLAM MUDALIAR AND ANOTHER, RESPONDENTS, (PLAINTIFF AND 2ND DEFENDANT).*

*Civil Procedure Code, section* 16—*Jurisdiction—Decree affecting property outside territorial jurisdiction of Court—Effect as between parties to the decree—Estoppel—Right of a person not a party thereto to question its legality—Cancellation of decree, suit for—Cause of action—Discretion of Court—Specific Relief Act, section* 39—*Fraud alleged but not proved—Effect.*

Some properties were hypothecated by the 2nd defendant to the 1st defendant's predecessor in interest and afterwards three of them were sold to plaintiff by the 2nd defendant and the Deputy Commissioner of Mysore who had attached them for arrears of Excise duty payable by the 2nd defendant to Government. Sometime after, the 1st defendant sued the 2nd defendant for recovery of the debt from all the hypothecated properties and a Razinama decree was passed by the Principal Munsiff of Mysore, directing the sale of all the mortgaged properties though all of them were situated outside the Munsiff's territorial jurisdiction. The 1st defendant applied to the Nanjangud Munsiff's Court for executing the decree and the latter ordered the sale of the properties. Thereupon, the plaintiff brought a suit for the cancellation of the decree so far as it affected the aforesaid three properties alleging that the said decree was passed without jurisdiction and that his rights in those properties remained unaffected.

*Held*, that the decree was not null and void as between defendant No. 1 and defendant No. 2 and that as the latter had not appealed against it, he was estopped from saying that he was not bound by it.

*Gomatham Alamelu* v. *Komandur Krishnamacharlu, I. L. R,* 27 *Mad.,* 118, *followed.*

*Vishnu Sakharam Nagarkar* v. *Krishnarao Malhar, I. L. R.,* 11 *Bom,* 170; *Lakshmishankar Devshankar* v. *Vishnuram, I. L. R.,* 24 *Bom.,* 77, *referred to.*

* Second Appeal No. 109 of 1902-03, against the decree of the Sub-Judge of Mysore in Appeal No. 24 of 1902-03, reversing the decree of the Principal Munsiff of Mysore in Original Suit No. 530 of 1900-01.

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*Held further*, that since the plaintiff did not consent to the decree in the suit to which he was not a party, there was nothing to prevent his questioning the legality of the decree as affecting his interests.

*Held also*, that, merely by the passing of the decree for sale against defendant No. 2, the plaintiff obtained no cause of action for the present suit and before he could bring such a suit, it was necessary for some circumstances to come into existence, necessitating his application for a declaratory decree, some act hostile to and invading his title, constituting such an otherwise inevitable injury, such an apprehension of serious injury that a Court could properly exercise its discretion to prevent it.

*Subbaraya Mudali* v. *The Sub-Collector of Chinglepet, I. L. R., 6 Mad.*, 307, *referred to.*

*Held also*, that though the plaintiff had not proved fraud in the decree, he had proved his right to a relief consistent with the plaint and evidence and that he might therefore be properly allowed a decree declaring that the decree for sale in Original Suit No. 574 of 1895-96 did not affect his right in the property in suit.

SUIT for cancellation of a decree. The Principal Munsiff of Mysore dismissed the plaintiff's suit on the ground that the suit as brought was not maintainable. On appeal, the Sub-Judge of Mysore reversed the Lower Court's decision and passed a decree in favour of plaintiff.

The 1st defendant preferred this Second Appeal.

Mr. *B. Nanjundappa* for the appellant.

Mr. *J. W. Hayes Junior,* for the respondents.

JUDGMENT.—The circumstances of this case are sufficiently plain. The defendant No. 2 mortgaged certain properties of which he was owner to the predecessor in interest of defendant No. 1. In 1895, the rights of defendant No. 2 in the three properties to which this suit relates passed to the plaintiff under a conveyance executed by defendant No. 2 and the Deputy Commissioner who had attached the property for arrears of excise duty payable by defendant No. 2. On the 19th December 1896, the father of defendant No. 1 obtained a decree for sale of all the mortgaged properties, including the three properties to which this suit relates. The defendant No. 2 was a party to that decree, but plaintiff was not a party to it. Though all the property was situated beyond his jurisdiction, the decree was passed by the Principal Munsiff of Mysore. After that the defendant No, 1 applied for execution of the decree by attach-

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ment and sale of the plaintiff's three properties, though the decree of defendant No. 1 was only for 65 Rs and though the value of the properties remaining to defendant No. 2 was 7 or 8,000 Rs. Thereupon the plaintiff has brought the present suit for cancellation of the decree so far as relates to the first three properties, those belonging to the plaintiff. In his defence the defendant No. 1 has pleaded that the plaintiff did not buy the lands in suit at a Revenue sale and acquired no right to the land and the suit is not maintainable. The Original Court held that there was no evidence of fraud, but the decree of the Mysore Munsiff's Court was illegal on the face of it; that the plaintiff had no reasonable apprehension of an injury from the decree and consequently the Court would not order it to be cancelled under section 39 of the Specific Relief Act, 1877. On appeal the learned Subordinate Judge reversed the decision, held that the plaintiff had reasonable apprehension when he came to know of the existence of the illegal decree, affecting his lands, because the decree was capable of being used as a means of vexatious litigation and serious injury against his rights and as a matter of fact the defendant No. 1 got the decree transferred to the Nanjangud Munsiff's Court and attached the lands in suit as liable under it. Against this decision, the defendant No. 1 has appealed to this Court.

Both the Original and First Appellate Courts have held that the decree obtained by defendant No. 1 was not fraudulent.

That it was passed without jurisdiction is plain from the fact that it was passed by a Court other than that in the jurisdiction of which the mortgaged property was situated contrary to the express provisions of section 16 of the Civil Procedure Code. Now, it is true that since the defendant No. 2 consented to the decree, the decree is binding as between defendant No. 1 and defendant No. 2, and the latter cannot question it in execution. The decree is not null and void as between them. (I. L. R., 27 Mad., p. 118.). The reason is that the defendant No. 2 could have made want of jurisdiction a ground for appeal and review; and since he did not do so, he is bound and estopped from saying he is not bound (*see* I. L. R., XI, Bombay at p. 170 where the subject is fully discussed; also I. L. R. 24, Bom., p. 77). But since the plaintiff did not consent to the decree in the suit to which he was not a party there is nothing to prevent his questioning the legality of the decree as affecting his interests.

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Now, merely by the passing of the decree for sale against defendant No. 2, the plaintiff obtained no cause of action for the present suit or for a declaration that the decree was null and void as against him, and for declaration of his title. Before he could bring such a suit, it was necessary for some circumstances to come into existence, necessitating his application for a declaratory decree, some act hostile to and invading his title, constituting such an otherwise inevitable injury, such an apprehension of serious injury that a Court should properly exercise its discretion to prevent it (3 N. W. 137: 3 N. W. 262: 2 N. W. 182: 7 W. R. 96: 9 W. R. 325: 14 W. R. 420: 6 Mad., 307). Such circumstances arose, it may properly be considered, after the decree for sale, when the defendant No. 1 in execution sought to bring to sale for the whole mortgage money the property of the plaintiff in which the defendant No. 2 had ceased to have any interest, as though the defendant No. 2 had retained his interest in it. That this was the intention of defendant No. 1 is plainly shown by his pleading in this suit that the plaintiff has no title in those properties. Although the plaintiff purchased the three properties subject to the mortgage made by defendant No. 2, they are not liable for the whole mortgage money; the owner of the equity of redemption, that is, the plaintiff is entitled to ask for apportionment under the ordinary rule and to have an opportunity of redemption of the mortgage debt due upon them, if his purchase was not free from encumbrances. The defendant No. 1 has sought to enforce the mortgage debt upon plaintiff's properties without giving the plaintiff an opportunity to redeem or to apportion or to contest the encumbrance; and has by his acts and express words brought the plaintiff's title into dispute. We think, therefore, that, according to the principles set forth in sections 39 and 40, Transfer of Property Act 1877, the Court would properly exercise its discretion in finding the decree to be void as against the plaintiff's properties in suit and declaring under section 42 the plaintiff's right and title.

The plaintiff, it is true, has asked that the decree for sale be declared void as against the plaintiff's property on the ground of fraud. He has not proved fraud; that is, that the decree was fraudulently passed. He has only proved that the decree was illegal,

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and that the defendant No. 1 has sought in execution, wrongfully and hostilely to the plaintiff, to have the equity of redemption sold as the property of defendant No. 2, whereas it is the property of the plaintiff. But though the plaintiff has not proved fraud in the decree, he has proved his right to a relief consistent with the plaint and evidence, and upon issues drawn and tried. See P. C. ruling *Sri Mahant Gobind Rao* v. *Sitaram Kesh* 2 C.W.N. 681 and 21 W. R. 8. The plaintiff, therefore, may properly be allowed a decree, declaring that the decree for sale in O. S. 574 of 1895-96 does not affect the plaintiff's right in the property in suit; and that the plaintiff made a valid purchase of the properties in suit before that decree for sale was obtained. Whether the properties to which this suit refers were conveyed to the plaintiff subject to or free from previous encumbrances is a question which has rightly been left open by the first Appellate Court.

In the result the appeal is dismissed with costs.

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## APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice A. E. Staley, Chief Judge,*
*Mr. Justice A. Rangaswami Iyengar, and*
*Mr. Justice H. V. Nanjundayya.*

1904. September 20.

RAMIAH AND 2 OTHERS, APPELLANTS, (DEFENDANTS NOS. 2, 3 AND 4)

*v.*

NARASINGAPPA AND 4 OTHERS, RESPONDENTS, (PLAINTIFFS AND DEFENDANTS NOS. 1 AND 5).*

*Indian Limitation Act, sections* 3, 26—*Declaratory suit—Right of taking fruit of trees—Easement—Limitation.*

The plaintiffs sued to establish their proportionate right to a certain tamarind tree and for recovery of proportionate produce. The defendants pleaded that the tree was entirely theirs and that the suit was barred by the law of limitation.

*Held,* (Justice RANGASAWMI IYENGAR, *dissenting*) that the taking of the fruit of a tree no doubt fell within the definition of "Easement" in the Limitation Act and that the plaintiff's suit had become time-barred.

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* Second Appeal No. 29 of 1901-02, against the decree of the Sub-Judge of Bangalore in Appeal No. 189 of 1900-01, reversing the decree of the Munsiff of Maddagiri in Original Suit No. 81 of 1899-00.

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SUIT for a declaration of title to a tree and recovery of produce. The Munsiff dismissed the suit. The Sub-Judge in appeal reversed the lower Court's decision and passed a decree in favour of plaintiff.

The defendants 2, 3 and 4 preferred this Second Appeal.

Mr. *K. T. Narasimha Iyengar* for the appellants.

Mr. *B. Nanjundappa* for the respondents.

This Second Appeal having come on for disposal before Mr. Justice Rangaswami Iyengar and Mr. Justice Meiklejohn, their Honours, owing to a difference of opinion, referred the following questions to a Full Bench under clause 3 of section 15 of Regulation II of 1890.

"(*a*). Does the tree stand on the land included in the road or on other Kharab land included in the 2nd defendant's holding Survey No. 10?

(*b*). Is the 2nd defendant entitled to the tree in dispute by reason of the road or the Kharab being included in his holding?

(*c*). Have the plaintiffs and his predecessors in interest been in possession of the tree before the Survey or enjoyed the usufruct of the tree since the Survey Settlement till 3 years before suit? and have the plaintiffs a right to the tree on the score of their enjoyment of the tree before Survey or since?

(*d*). Does such enjoyment create a title by prescription in favour of plaintiff to the tree?"

This Second Appeal then came on for hearing before the Full Bench constituted as above.

JUDGMENT:—THE CHIEF JUDGE.—I think for the reasons given by Mr. Justice Meiklejohn that the tree in suit being within the ambit of Survey No. 10 settled with the 2nd defendant in 1876-77 the ownership of the tree has vested in that defendant.

Mr. Justice RANGASWAMI IYENGAR has observed that it is a practice of the Survey Department to measure the bank of a stream channel or pathway between two fields along with one of the fields in order

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to avoid the necessity of allotting to the bank a separate Survey number but that this practice cannot make the bank as the private property of the owner of the particular Survey number so as to entitle him to cultivate it: that the tree in suit appears to stand on the Kharab of the road, the margin apparently of the road. He has therefore proposed the following issues:—

1. Does the tree stand on the Kharab land belonging to the road or to the owner of Survey No. 10?

2. Is the road, including the Kharab containing the tree, public property, or that of the owner of Survey plot No. 10?

I do not however find on the record any reference to the practice of the Survey Department alluded to; or that the practice was exercised with reference to the tree in suit or the land on which or the road by which it stands. The plaintiff has not attempted to make out that his title is based on the practice alluded to. It is not the case of either party that the tree is not on land Survey No. 10, or that the land or tree does not belong to the owner of Survey plot No. 10. The plaintiff in his evidence expressly states that though he and his father have been taking the *produce* of the tree for many years, it was in the Survey of 1876-77 settled that the owners of the land are the owners of the trees in it; and expressly admits that the tree in suit *is* in the land belonging to defendant No. 2. I therefore think that there cannot be a remand as suggested: and that we should not offer to make out for plaintiff a case which he has not made out or set up.

The learned Judge has further observed that the fact of plaintiff paying tax to Government for the tree in suit shows that the land on which it stands is the property of Government. But the latter has passed the legal title to the whole of Survey plot No. 10 to the defendant No. 2; and the plaintiff admits it. The inference therefore cannot be drawn.

The legal effect of the settlement was, as shown by Mr. Justice Meiklejohn, to make the owner of the Survey number the owner of the soil within it and consequently of all trees growing on it. It does not follow that such settlement holder would have the right to *cultivate* all lands of the Survey number. His ownership is subject

in the absence of any legal provision to the contrary to the ordinary incidents of ownership, such as easements held by others. Though not the owner of the land upon which the tree stands the plaintiff might acquire the right to appropriate the fruit and wood of the tree by way of easement. (Section 3, Limitation Act 1877. I. L. R., 23 Cal., p. 55 especially p. 59). But the plaintiff must show (section 26 of the Act) that he peaceably and openly enjoyed the right as an easement as of right without interruption and for a period of twenty years ending within two years next before the institution of the suit wherein the claim to which such period relates is contested. The plaintiff's case in this suit is that defendants 2 and 4 interrupted his possession and themselves took possession of the tree in January 1897. The present suit was filed on the 7th August 1899 and is therefore barred. For the reasons given I hold that the plaintiff's suit should be dimissed and the appeal allowed with costs.

Mr. Justice H. V. NANJUNDAYYA.—Questions c and d referred to the Full Bench may be disposed of in a few words. The plaintiffs claim the full ownership of the tree on the strength of their long enjoyment and payment of rent to Government, and not merely a right of taking its fruit by prescription. The 1st plaintiff himself says that the 2nd, 3rd and 4th defendants were taking the produce since Durmukhi (1896-97). The 4th witness says that defendant No. 2 has been taking the fruit for 3 or 4 years past. The suit was filed on 8th August 1899. The taking of the fruit of a tree no doubt falls within the definition of 'Easement' in the Limitation Act, but under section 26, it must be proved that the claimant has had 20 years' uninterrupted enjoyment, till within 2 years previous to the suit. The evidence for uninterrupted possession for the requisite period is also vague and unsatisfactory. I would answer both these questions in the negative.

The plaint states that the tree stands in the Kharab of land No. 10, registered in the names of Siddayya and Honnayya. The defendants pleaded that the tree stood on their land. There was no issue on the matter corresponding to question (a) now referred to us. The 1st plaintiff in his deposition expressly admits that the tree is in Survey number 10. The Khetwar register extract (Exhibit F) shows that one gunta of land is unculturable in this number; but there is no evidence to show whether this deduction is made on account of the pathway in the field or for any other reason.

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One of the witnesses says there are two old wells in it. It may be that they take up the Kharab area. If the tree stands on the Kharab area, the plaintiff was bound to prove it. The witnesses say that the tree stands by the side of the pathway and that land under it is not being cultivated. Crops do not grow in the shade, and land overshadowed by trees generally lies fallow in the fields. I would say in answer to the first question that there is no evidence that this tree stands on the Kharab portion of this field.

Even supposing that the tree stood on the Kharab portion of the field, I think the next question (b) should be answered in favour of the defendant. Mr. Justice Meiklejohn's judgment clearly shows that the tree vests in the occupant of the land. It is true that the Survey Settlement does not operate to deprive any party of the rights previously possessed by him. When lands are given out to an occupant, his right becomes heritable and transferable property both according to the established custom of the country, and the positive rule laid down in section 70 of the Revenue Regulation. There is no such provision for trees, and it cannot be contended that the Government cannot strike off the assessment and resume the trees. Whatever may have been the case before, the provisions of the Revenue Code are inconsistent with the recognition of the right of any body but the occupant to any tree that has not been reserved in accordance therewith for Government. This not having been done in this case, the tree has become the defendants' property.

The plaintiff mainly bases his right on the order found in Exhibit E. The account of which it is a copy does not correspond to any of the recognised forms of village or Taluk accounts. It is not shown under what authority it has been issued. It is difficult to say whether this particular tree is meant by it, as the description given is a tree standing in the Kharab for a pathway. The witnesses call this 'the tree in front of the village,' but they say there are three or four such trees. It is impossible to hold that this document is sufficient to override the effect of express provisions of the Revenue Law.

The plaintiff's suit cannot succeed, and should be dismissed with costs throughout.

Mr. Justice A. RANGASWAMI IYENGAR.—I have perused all the Survey accounts except the Phaisal patrika which was not received.

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In the Gida patrika, one tree is shown as standing in Survey No. 10 in dispute but nothing is mentioned as to the person in possession or enjoyment of the tree. In Survey No. 11, which is registered in the name of tho predecessor of plaintiff, a tamarind tree is shown as being in his patta on a kandayam of annas 10-4. No orders are passed by the Survey Settlement Officer as against each number or tree but there is a general order that trees in individual holdings should be enjoyed by the occupants, that fruits of trees on unoccupied lands might be sold annually and that, when lands containing trees are applied for, they might be sold according to practice. It is clear therefore that the holding of the tree on payment of kandayam pleaded by the plaintiff is unauthorized and contrary to rules. But this cannot however affect alienation *inter vivos* by parties, or enjoyment by consent or adverse possession. With regard to the last I have only to observe that the possession of a tree and enjoyment of its produce does not properly come under easement. The tree comes under the definition of immovable property and its possession and enjoyment amounts to adverse possession of immoveable property and should properly be regulated as regards limitation by Arts. 142 and 144, Schedule II and section 28 of the Limitation Act and not sections 26 and 27 of the Act.

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## APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

SHEIK IMAM SAB, APPELLANT, (PLAINTIFF).

*v.*

PATAIL AJJE GOWDA, RESPONDENT, (DEFENDANT).*

1904. September 29.

*Civil Procedure Code, section 244—Suit to set aside execution sale—Irregularity in conducting sale—Inadequacy of price—Inference—Right of suit—Procedure in the absence of fraud—Plaint treated as an application under section 244.*

In a suit brought by a judgment-debtor to set aside a sale held in execution of a decree, he alleged that there were several irregularities in conducting the sale, that the price realised from the sale was too low and that the defendant (decree-holder) acted fraudulently by filing a false affidavit with regard to the property before the sale.

* Second Appeal No. 167 of 1903-04, against the decree of the District Judge of Shimoga in Appeal No. 185 of 1902-03 reversing the decree of the Sub-Judge of Chickmagalur in Original Suit No. 527 of 1900-01.

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*Held*, that under the circumstances of the case, the reasonable inference was that the property was sold at a price much below its true value in consequence of the irregularities in conducting the sale.

*Venkatasubbaraya Chetti* v. *Zamindar of Karvetinagar, I. L. R.*, 20 *Mad.*, 159; *Mahabir Pershad Singh* v. *Dhanukdhari Singh, I. L. R.*, 31 *Cal.*, 815, *followed*.

*Held further*, that in the present case no suit would lie and the plaintiff would have a remedy under section 244, Civil Procedure Code.

*Held also*, that the plaintiff's suit should be treated as an application in execution and that the sale should be set aside.

*Jhamman Lal* v. *Kewal Ram, I. L. R.*, 22 *All.*, 121; *Briu Mahata* v. *Shyama Churn Khawas, I. L. R.*, 22 *Cal.*, 483; *Lalman Das* v. *Jagan Nath Singh, I. L. R.* 22 *All.*, 376, *followed*.

SUIT for the cancellation of an execution sale. A judgment-debtor instituted the suit on the allegations that the property sold was not duly attached, that the proclamation of sale was not duly published and that bidders were shut out in consequence of the decree-holder filing a false affidavit in the execution proceedings. The defendant who was both decree-holder and auction-purchaser denied those allegations. The Subordinate Judge of Chickmagalur decreed the plaintiff's suit. In appeal, the District Judge of Shimoga reversed the lower Court's decision and dismissed the suit.

The plaintiff preferred this Second Appeal.

Mr. *S. Narayana Rao* for the appellant.

Mr. *S. Ranganna* for the respondent.

JUDGMENT—This is a second appeal in a suit by a judgment-debtor now appellant to set aside a sale in execution, on the ground that the property in suit was not duly attached, that the sale proclamation was not duly published, that the decree-holder filed a false affidavit that the appellant had transferred the property to his wife, and that in consequence the appellant suffered loss as the property was sold at a low price. The Original Court decreed the suit. The first Appellate Court dismissed the suit and allowed the appeal.

The land in suit was sold in execution for Rs.195-11-4. The area of the land is $5\frac{14}{40}$ acres assessed at Rs. 5 a year; and there are 2,000 coffee plants and many jungle trees on it. The plaintiff and two witnesses for him have valued it at 1,000 and more. The

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defendant deposed in his own behalf when examined as a witness for plaintiff; but defendant examined no witness. The learned District Judge has commented on plaintiff's giving in his plaint the value as only 500 or 600 as discrediting the plaintiff's case. But the plaintiff not having been asked to explain the discrepancy, the statement cannot be used against him. The plaintiff did not depose till nearly two years after his suit was filed and it is quite possible that the value of the plantation increasad in the interim. We have no doubt that the property was sold at a very inadequate price such as to cause material loss to the plaintiff.

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The defendant filed a false affidavit before the sale that plaintiff had conveyed the property in suit to his wife. The learned District Judge considers that, as the defendant added that the land was not affected by the conveyance, it could not have been the intention of the defendant to keep off bidders: and the affidavit was not calculated to keep off bidders and did not in the least prejudice the plaintiff. We cannot however agree with this opinion. We think that the announcement of the conveyance was one practically to the effect that the plaintiff intended to dispute the right of any purchaser and force him to litigation. We think the inevitable effect of this false announcement was to keep off bidders and reduce the price.

We think also that the evidence for plaintiff, denying the service of attachment and sale proclamation, was sufficient to put defendant to prove by some sufficient evidence that due service was effected, and that defendant not having done so, it must be held that no such service was effected.

The reasonable inference from all the circumstances is, that the property was sold at a price much below its true value owing to the irregularities noticed. (I. L. R., 20 Mad., 159; I.L.R., 31 Cal., 815).

It is possible that the false affidavit was made by mistake and that the proceedings were without fraud on the part of the defendant. In such case, no suit would lie and the plaintiff would have a remedy under section 244, Civil Procedure Code. The suit however can be treated as an application in execution being admittedly within time (I. L. R., 22 All., 121; I. L. R., 22 Cal., 483; I. L. R., 22 Mad., 347; I. L. R., 22 All., 376). We order accordingly, directing that each party pay his own costs in all these proceedings. The sale is set aside. The defendant being in possession, mesne profits will be ascertained in execution.

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# APPELLATE CIVIL.

*Before Mr. Justice A. Rangaswami Iyengar and Mr. Justice H. V. Nanjundayya.*

1904. July 9.

RACHIAH SETTY, APPELLANT, (DEFENDANT)

*v.*

NANJAMMA, RESPONDENT, (PLAINTIFF).*

*Hindu Law—Joint Hindu Family—Hindu Widow—Maintenance—Suit by Sister-in-law against brother-in-law—Death of plaintiff's husband prior to his father's death—Father-in-law's properties inherited by brother-in-law—Legal obligation of heir—Refusal of widow to live with her brother-in-law—Effect on her claim.*

An undivided member of a joint Hindu family died leaving his widow (plaintiff), father and a brother (defendant). After the father's death the widow sued her brother-in-law for separate maintenance alleging that all her father-in-law's properties had been inherited by the defendant who was in possession of them at the time of suit. It was contended by the defendant that the properties in his possession were all self-acquired and that he was not liable to allot a separate maintenance to the plaintiff.

*Held*, that as the defendant's father was found to have left some property at his death and as the defendant kept back his father's accounts, he must be taken to have continued his father's trade and therefore the plaintiff had a claim on him for maintenance.

*Janki* v. *Nand Ram, I. L. R., 11 All., 194; Rangammal* v. *Echammal, I. L. R., 22 Mad., 305, approved.*

*Held also*, that plaintiff was entitled to retain her maintenance even after leaving her husband's house, unless she was guilty of unchastity or other disreputable practices.

*Sri Maniyam Mahalakshmamma Garu* v. *Sri Maniyam Venkataratnamma Garu, I. L. R., 6 Mad., 83; Siddessury Dassee* v. *Janardan Sarkar, I. L. R., 29 Cal., 557, followed.*

SUIT for maintenance. The Munsiff of Chickballapur passed a decree in favour of plaintiff directing the defendant to pay her an allowance of Rs. 5 per mensem and to put her in possession of a portion of defendant's ancestral house or in default to pay her a sum of Rs. 50 for building a house.

The defendant preferred this Regular Appeal.

* Regular Appeal No. 209 of 1901-02, against the decree of the Munsiff of Chickballapur in O. S. No. 585 of 1900-01.

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Mr. *L. Sreenivasa Iyengar* for the appellant.

Mr. *C. Krishna Murti* for the respondent.

JUDGMENT.—This is an appeal against the decision of the Munsiff of Chickballapur, awarding maintenance to plaintiff. The husband of plaintiff was the elder brother of the defendant and died about 40 years ago. The defendant's father died a few years after him. The family was undivided. The plaintiff, who had not attained her puberty at the time of her husband's death, continued to live in her parents' house and only visited occasionally, the defendant, whenever he came to Chickballapur from Bombay. These facts are admitted. The defendant's contention is that his father left no property at his death except his share in the ancestral house, that since then the defendant managed to set up a small trade in cloths by his own exertions, which he carried on for a few years at Chickballapur, that he then left for Bombay without any capital and managed to acquire all the property which he now possesses, and that he is not therefore liable to pay any maintenance to plaintiff. It is alleged in plaint that the defendant's father died, leaving properties worth 10 or 15 thousand rupees. But plaintiff did not produce any satisfactory evidence in support of this allegation. She was her own witness and admitted her want of knowledge. The 2nd witness was her brother who merely repeated the statements in plaint. The 3rd witness was their purohit at Chadanur and was only a young man at the time of the death of defendant's father. This is all the evidence for plaintiff.

2. On the other hand, the defendant has produced more definite evidence on some points. But it is not quite complete. His 6th witness is his own uncle or father's younger brother. He says that himself and his 2 brothers effected a partition about 30 or 35 years ago, when an arbitration award was made by a panchayet which was not signed by the arbitrators, and a copy was given to each brother. The witness has produced his own copy, dated 22nd June 1864, and states that, according to it, defendant got a portion of the family house and effects and outstandings to the value of Rs. 2,164-6-9, and debts to the extent of Rs. 1,235-2-8. The debt payable by other sharers was only Rs. 322-6-9 each, due, it is explained that defendant's father had married 2 or 3 times and both his sons were also married. His share of gold and silver jewels were worth about Rs. 1,400 on the persons of plaintiff, defendant's

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wife and defendant's mother. The value of the jewels is a fair indication of the position and respectability of the family, and this witness further says that the defendant's father, after division, was trading in chillar shop and cloths as well as in gold and silver. The witness is unable to say what property was left by defendant's father at his death.

3. The defendant has deposed that his father died in Akshaya, 1866 and that his brother died some ten years earlier, that his "father was trading in gold and silver. He may have been trading in cloths also. I do not remember that well. Yet he was not in well-to-do circumstances." He has also deposed that, before he went to Bombay, or rather after his father's death, he was trading as Dallali in his own shop, which consisted in bringing cloths from other shops for sale to customers or taking them to other shops and getting brokerage. He then in 1870 had a partnership trade in cloth with one Vyasa Rao who lent funds, though he says that he was not entirely without funds. This trade lasted 3 years and then he had a cloth shop of his own till 1878 when he left for Bombay. He says that the stock of the shop was then worth about 1,000 Rs. besides 3,000 or 4,000 Rs. due from customers.

4. It will be noticed that defendant did not care to admit that his father was trading in cloths. This is probably from a fear that he would be held to have continued his father's cloth trade. From the omission of defendant to produce his father's copy of arbitration award and his father's accounts, it must be presumed that they would not support his contention that his father died without leaving much property. If he was not in fairly good circumstances at his death, it is scarcely likely that there would have been no suits against his estate, or his house would have remained unsold unless he had left property to meet the debts which defendant says that he discharged; he has not however produced his accounts in support of his allegation. They would have thrown some light on the circumstances of the family. It must therefore be found that defendant's father left some property though there is no means of fixing its estimated value. It is probable that he (defendant) did not take any considerable funds to Bombay and that his subsequent earnings were all the result of his own intelligence and enterprise.

5. With these findings on facts, we may now proceed to consider the law as it now stands. Mayne in his Hindu Law starts with

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the remark that "there is some difference of opinion as to whether the right of maintenance is an absolute obligation which attaches itself upon certain persons by virtue of their relationship to the destitute individual or whether it is merely a claim upon the property of those who hold it by virtue of their possession of the property." (*See* p. 586, 6th edition). He then states that in Madras "suits for maintenance have been dismissed when brought by a widow against her brothers-in-law or her father-in-law, who hold no ancestral property" and that the same principle was affirmed in Bengal and in Allahabad. He then goes on to say that the principle that a widow of a son has no legal claim for maintenance against the separate or self-acquired property of her father-in-law, was affirmed by a Full Bench of the Allahabad High Court. They held, however, that the father-in-law was under a moral obligation to provide for the widow out of this property, and that, when, upon his death, the property devolved upon his other sons, they came under a legal obligation to carry out this moral obligation and could be compelled to do so (*Janki v. Nand Ram,* 11 All., 194). This has been approved and followed in Bengal and in Madras.—*Vide* 22 Madras 305.

6. It has been found, as a question of fact, that the defendant's father did inherit some family property when a partition was effected between him and his brothers. It has also been found that he must have left some property at his death, that defendant, who was capable of throwing light on the subject, has kept back the father's accounts and that there is reason for holding that he must have continued the father's trade. Under these circumstances, it must be held that the plaintiff has a claim on defendant for her maintenance.

7. The next question for consideration is, whether plaintiff is entitled to enforce her claim even when she refuses the defendant's proposal that she should live with him. Mayne says, that, "no doubt the family house of her husband's relations is a proper but not necessarily the most proper place for her continued residence." P. 595; and that the Privy Council have held that "all that is required of her is that she is not to leave her husband's house for improper or unchaste purposes, and she is entitled to retain her maintenance, unless she is guilty of unchastity or other dis-reputable practices, after she leaves that residence." This has been followed

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in 6 Madras 85. The same principle has been affirmed in 29 C. 557. (*See* pp. 568 and 574).

8. As regards the amount of maintenance, there seems to be no clear rule. The only authority referred to in Mayne is the dictum of the Bombay High Court that "the widow is not, at the utmost, entitled to a larger portion of the annual produce of the family property than the annual proceeds of the share to which her husband would have been entitled on partition, were he now living." It is very difficult to determine on the facts of this case what would be the value of her husband's share at this time. But even if we consider that all defendant's acquisition subsequent to his leaving for Bombay should be treated as his self-acquired property, we have his admission that his cloth trade was worth Rs. 1,000 for stock and 3 or 4,000 outstandings. Even taking half of this for the share of plaintiff's husband, the allowance awarded by the Lower Court is not too high. There is some force in the appellant's argument that the plaintiff was able to do without any allowance for 40 years, that this suit is the result of zid and that, for a Vysya widow residing in the country with her relatives, the sum of Rs. 5 per month is not required. But as it will not be any drain upon the defendant who is admittedly a man of large property, we are not prepared to reduce the allowance. There is, however, no reason, why the allowance should be paid in advance, especially as she will be entitled to arrears from date of suit. The decree will be modified in this respect, and subject to this modification, the decision of the Munsiff is affirmed and this appeal dismissed.

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# APPELLATE CIVIL.

*Before Mr. Justice A. Rangaswami Iyengar and Mr. Justice H. V. Nanjundayya.*

NANJAPPA, APPELLANT, (1ST DEFENDANT). 1904. July 12.

*v.*

NARASIMHASWAMI, RESPONDENT, (PLAINTIFF).*

*Hypothecation—Purchase by hypothecatee of a portion of hypothecated property—Suit for recovery of money due on the bond from the rest of the property—Plea that purchased property should be liable for decree amount* pro rata—*Interest from date of suit to date of decree.*

On the 19th November 1895, 1st defendant's father executed a registered hypothecation deed in favour of plaintiff for Rs. 7,375. Two items of the hypothecated property were purchased by the plaintiff from the 1st defendant's father for Rs. 2,970. The plaintiff sued to recover a sum of Rs. 8,478-11-10 being the amount due under the bond from the remaining items of the hypothecated property. The 1st defendant contended that the property purchased by the plaintiff should be made liable to the decree amount *pro rata.*

*Held*, that the sale effected between the parties was not of the equity of redemption but of the property independent of the hypothecation lien and therefore the 1st defendant was not entitled to claim that that property should be made liable to the amount claimed in suit or that plaintiff should be compelled to proceed against it in the first instance.

*Fakiraya* v. *Gadigaya, I. L. R.,* 26 *Bom.*, 88; *Bisheshur Dial* v. *Ram Sarup,* 22 *All.*, 284; *Chicka Hallay Gowda* v. *Jogy Gowda,* 3 *Mys. Ch. Ct. R.*, 6, *distinguished.*

*Held also*, that the plaintiff's claim for interest at 12% from date of suit to date of decree must be allowed as the question was concluded by a decision of the Chief Court.

*Lakshminaranappa* v. *Srirungia,* 4 *Mys. Ch. Ct. R.*, 53, *followed.*

SUIT on a hypothecation bond. The Sub-Judge of Mysore passed a decree in favour of plaintiff but awarded interest from date of suit to date of decree only at 6 per cent. instead of 12 per cent. which was the rate fixed in the bond.

The 1st defendant preferred this Regular Appeal.

* Regular Appeal No. 364 of 1902-03, against the decree of the Sub-Judge of Mysore in O. S. No. 4 of 1901-02.

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NANJAPPA v. NARASIMHA-SWAMI.

The plaintiff filed a memorandum of objections in respect of the interest disallowed by the Lower Court

*Messrs. L. Sreenivasa Iyengar* and *M. D. Naraniengar* for the appellant.

Mr. *M. B. Varadaraja Iyengar* for the respondent.

JUDGMENT.—This is an appeal against the decision of the Sub-Judge of Mysore in O. S. No. 4 of 1901-02, awarding plaintiff the whole amount sued for, as due under a deed of hypothecation executed by 1st defendant's father. In this appeal, the first defendant contended first that the plaintiff had failed to account for two jewels given to him as additional security at the time of the hypothecation. The deed of hypothecation contains no mention of the jewels. Exhibit L a receipt executed by one M. Nanjanna acknowledging receipt of monies due to him from 1st defendant's father on pledge of jewels and documents from the plaintiff does not state that the jewels were returned to the plaintiff, while Exhibit II, a receipt executed by 1st defendant's father to the said Nanjappa, admits the receipt of the jewels without any reference to show that they had been given into the possession of the plaintiff. In the face of these documents, we are not prepared to give any credit to the oral evidence of witnesses, of whom 4th and 5th witnesses are related to 1st defendant. The 6th and 16th witnesses are not related to him but their statements are improbable and unworthy of credit. The 9th witness is a servant in an Ursu gentleman's house on Rs. 4 a month, while the third witness is a former Gumasta of 1st defendant. Their statements also are evidently interested and of no value. We accordingly overrule this ground of appeal.

It was next contended that plaintiff has not accounted for Rs. 1,300 received by him as compensation for a portion of the hypothecation property taken up by the Municipality. The plaintiff has sworn that he first received Rs. 1,200, that out of this Rs. 375 were paid towards pro-note B as per endorsement $B_1$ and Rs. 825 towards interest on the plaint document under endorsement $D_1$. In the former endorsement which is in the handwriting of 1st defendant's father, he has stated that Rs. 375 was part of the Municipal

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compensation. In $D_1$ which is also in his handwriting and bears the same date as $B_1$ that fact is not mentioned. But as both endorsements were written at the same time, the omission is immaterial and there is no reason for rejecting the plaintiff's statement. The plaintiff has also explained that the remaining sum of Rs. 100 was taken by the 1st defendant's father for paying taxes. This contention of the defendant must also fail.

The next ground taken is that the property purchased by the plaintiff from 1st defendant's father under Exhibit C should be liable *pro rata* to the decree amount. In Exhibit C, a portion of the compound of the house which forms the first item of the properties hypothecated under Exhibit D is conveyed to plaintiff for Rs. 2,970, almost the whole of it being credited towards the interest due on the hypothecation. It is argued for the 1st defendant that, as the hypothecation is referred to in the document and it is not expressly stated that the property is sold free from the liability to the hypothecation, the Equity of Redemption alone should be held to have been purchased by the plaintiff and that the wording of the plaint itself showed that he had bought it on that understanding. From a consideration of the value paid for the parcel, the evidence of the Vice-President Mr. Nanjundaraj Urs regarding the purchase of another portion for the Municipality and the surrounding circumstances of the case, we are satisfied that the sale effected by the parties was not the Equity of Redemption, but of the property independent of the hypothecation lien, and that, in a case like the present, between the mortgagee and the mortgagor, the question of contribution does not arise. The cases reported at 26 B., 88 and 22 All., 284 clearly refer to purchase by the mortgagee of the Equity of Redemption of certain items included in the mortgage and the suits are between them and purchasers of other properties subject to the mortgages and can serve as no guide in the present case. In the case reported at 3 Mysore Ch. Ct. R. 6 also, the mortgagee only bought the land, subject to his mortgage at a Revenue sale for arrears, and it was therefore held liable to his mortgage debt. It is true the description of the schedule in the plaint is the same as that of the deed of hypothecation and the wording of the plaint is also indefinite. But it is contended that the boundaries of the plaint

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schedule are applicable to the house in its present condition. From the conduct of the plaintiff in omitting to sue other persons who had purchased some parcels like himself and his subsequent pleadings, it is abundantly clear that the alienated portions of the compound of the house were not intended to be made liable to the claim. We are therefore of opinion that the first defendant is not entitled to claim that these items should be made liable to the amount claimed in suit or that the plaintiff should be compelled to proceed against them in the first instance.

The appeal thus fails and must be dismissed with costs.

The plaintiff has filed a cross-appeal claiming interest at 12 per cent. from date of suit to date of decree. This question is concluded by the decision of this Court (*see* 4 Mysore Ch. Ct. R. 53). This appeal must be allowed with costs and the decree modified accordingly.

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## APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

1904. August 5.

DODDA SIDDAPPA AND 3 OTHERS, APPELLANTS, (DEFENDANTS)

*v.*

DODDAIYA, RESPONDENT, (PLAINTIFF).*

*Registration Act, 1877, section 17 clause (b)—Unregistered document styled a receipt—Right to obtain another document created thereby—Title of parties also declared in the document—Evidence—Admissibility.*

In a suit by the purchaser of a house for recovery of possession, the defence was that the house had been resold to one of the defendants and in support of this, a document which was styled a receipt was produced but the same was not admitted in evidence for want of registration. In appeal, it was contended that the document did not require registration.

*Held*, that as the document declared the plaintiff's title by his former purchase and also declared it assigned to defendant No. 2 by the latter purchase on the date of the document, it was a document requiring registration under sub-section (b) of section 17, of the Indian Registration Act, and there-

* Regular Appeal No. 385 of 1902-03, against the decree of the Munsiff of Maddagiri in Original Suit No. 282 of 1901-02.

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fore the lower Court was right in holding that the document was inadmissible for want of registration.

*Hurnandun Singh* v. *Jawad Ali, I. L. R*, 27 *Cal.*, 468, *distinguished.*

SUIT for possession of a house. The Munsiff of Maddagiri passed a decree in favour of plaintiff.

The defendants preferred this Regular Appeal.

Mr. *B. Nanjundappa* for the appellants.

Mr. *L. Sreenivasa Iyengar* for the respondent.

JUDGMENT.—This is an appeal from the decree in O. S. No. 282 of 1901-02 passed by the Munsiff of Maddagiri Sub-Division, allowing the plaintiff's suit to recover possession of a house sold by the four defendants to plaintiff on a registered deed of sale dated 23rd June 1894. The plaintiff's case is that he acquired possession of and occupied the house for a year after the sale; that he then allowed the defendants to live in it till March 1901; that, when he demanded possession, they refused to give it; and that thereupon he brought this suit to enforce his title. The defendants have appealed against the decree.

The case set up for defence is this. It is admitted that plaintiff purchased and was in possession for five or six months under his purchase. But it is alleged that defendants who are brothers, divided after the sale, and defendant No. 2 repurchased from the plaintiff on the 6th September 1896, succeeding plaintiff's tenant Putsamanna. Defendant No. 2 has propounded a document styled a receipt, purporting to be executed by plaintiff in favour of the 2nd defendant Sidramanna in these terms. "I had purchased the house in which you are now living on the 23rd June 1894 for Rs. 500. As you were in need of a house, I have resold the same house this day to you for the same price Rs. 500 and I have received this day Rs. 250 in cash towards the price. I have agreed to recover the balance of Rs. 250 in annual instalments of Rs. 50, the first instalment commencing from this date. In case of default to pay any of the instalments in time, such instalment must be repaid with interest at 1 per cent per mensem for that year. After the balance of Rs. 250 is recovered, I will execute a registered sale deed in your favour. So I have agreed and executed this receipt."

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The first question to be decided is, whether this document is such as to require registration within the terms of section 17, Registration Act, 1877.

There is no doubt that if the receipt merely contained an agreement to execute the registered sale deed which, when executed was to create, declare, assign, limit or extinguish the right, title or interest of any of the parties in the house, the document would not require registration being within the terms of sub-section (b), section 17 of the Act. But the document does more than this. It declares the plaintiff's title by his former purchase and declares it assigned to defendant No. 2 by the latter purchase on the date of the document. We think, therefore, that it was a document requiring registration under sub-section (b) of section 17. Our attention has been drawn to a ruling I. L. R. Cal. 27, p. 468. But in the document then in suit there was no declaration that the plaintiff had bought and the defendant had bought from the plaintiff. The terms of the document there, were that acknowledgment was made of receipt of earnest money on completion of negotiations to sell *i.e.* for a future sale with a promise to execute the deed of sale at a future date. The High Court expressly held that this was merely an agreement to sell. It was not a document declaring that a sale had been made. We think that the learned Munsiff has rightly held that the document in the present suit was inadmissible for want of registration.

It is urged that plaintiff has not sufficiently proved that he allowed the defendants to occupy the house without rent. We think the plaintiff's case is doubtful on this point, because it seems he had no apparent reason for favouring them as he suggests. We think, however, that this is immaterial when the plaintiff has a clear title to recover possession.

No attempt has been made in this Court to traverse the reasons given by the learned Munsiff for holding that the assertion of the defendants that Rs. 190 were paid by defendant No. 2 to one Thimmappa on plaintiff's account is false.

The appeal is dismissed with costs.

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# APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

SESHAMMA, APPELLANT, (DEFENDANT)

1904. August 5.

*v.*

RAMA CHAR, RESPONDENT, (PLAINTIFF).*

*Indian Limitation Act*, 1877, *section* 18, *Schedule II, Article* 62—*Money due to plaintiff wrongly received by defendant—Suit for its recovery after three years from date of receipt—Limitation—Fraud.*

On 19th January 1901, plaintiff brought a suit for the recovery of some money from the defendant (his daughter-in-law) alleging that the amount which was due to him from one Muniappa had been wrongly received by her on 15th October 1897. The defence was that the suit was time-barred.

*Held*, that a suit for money payable by the defendant to plaintiff for money wrongly received by defendant which was really due to the plaintiff came within Article 62, Schedule II of the Limitation Act, 1877 and therefore the present suit was time-barred as it was not brought within three years from the date of receipt of money.

*Raghumoni Audhikary* v. *Nilmoni Singh Deo, I. L. R.*, 2 *Cal.*, 393; *Vishnu Bhikaji Phadke* v. *Achut Jagannath Ghate, I. L. R.*, 15 *Bom.*, 438; *Thakur Prasad* v. *Partab, I.L.R.*, 6 *All.*, 442; *Banoo Tewary* v. *Doona Tewary, I. L. R.*, 24 *Cal.*, 309; *followed.*

*Held also*, that section 18 of the Limitation Act could only apply when the rightful owner was kept from the knowledge of his rights by an industrious and artful concealment and not by mere omission of the wrongful possessor to notify the rightful owner of the wrongful possession and that the present case where the plaintiff had not alleged any facts constituting fraudulent concealment was not governed by that section.

SUIT for money. The Additional Munsiff of Bangalore passed a decree in favour of plaintiff.

The defendant preferred this Regular Appeal.

Mr. *K. T. Narasimha Iyengar* for the appellant.

Mr. *C. V. Narasimha Iyengar* for the respondent.

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* Regular Appeal No. 254 of 1903-04, against the decree of the Additional Munsiff of Bangalore in Original Suit No. 880 of 1901-02.

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SESHAMMA v. RAMA CHAR.

JUDGMENT:—THE CHIEF JUDGE.—This is an appeal against the decree of the Additional Munsiff of Bangalore allowing the plaintiff-respondent's suit for recovery of a sum of money paid by one Muniappa to the appellant. The plaintiff's case is that he sold some trees to one Muniappa for Rs. 100 and for the price took a bond from him on the 10th April 1895 in the name of the plaintiff's son Seshachar because the plaintiff was old and inform. Seshachar however predeceased the plaintiff. The defendant-appellant Seshamma received the money due from the debtor on the 15th October 1897. The plaintiff's case is that he came to learn of this payment on the 6th September 1899 and he has brought the present suit on the 19th January 1901. Seshamma is widow of Seshachar and her case is that the money belonged to Seshachar and after his death to her. There is no doubt for the reasons given by the learned Munsiff that the money belonged to the plaintiff. But I think the suit is barred by limitation. A suit for money payable by the defendant to the plaintiff for money wrongly received by the defendant which is really due to the plaintiff comes within Article 62, Schedule II of the Limitation Act, 1877, and the suit must be brought within three years of the date of receipt of the money (I. L. R., 2 Cal., p. 393; I. L. R., 15 Bom., 438; 2 C. L. R., 165; I. L. R., 6 All., 442; I. L. R., 24 Cal., 309 and there are many other rulings to the same effect). It is urged that the plaintiff is entitled to the benefit of section 18 of the Limitation Act because the defendant fraudulently realized the money and did not inform him of the payment to her. But that section can only apply when the rightful owner is kept from the knowledge of his rights by an industrious and artful concealment, and not by a mere omission of the wrongful possessor to notify the rightful owner of the wrongful possession (5 W. R., 283; 8 W. R., p. 22). In the present case the plaintiff has not alleged any facts, constituting fraudulent concealment. Apparently he had only to inquire of the defendant or Muniappa and he would have ascertained the receipt of the money by the defendant. Defendant received the money on the 15th October 1897 and the suit was not brought within three years of that date. It is therefore barred. The appeal is allowed with costs and the suit dismissed with costs.

Mr. Justice A. RANGASWAMI IYENGAR.—I agree.

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## APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

K. MUNIYAPPA, DECEASED BY HIS REPRESENTATIVE AND DAUGHTER MANGAMMA, APPELLANT, (DEFENDANT)

1904. August 8.

*v.*

SRINIVASA IYENGAR, RESPONDENT, (PLAINTIFF).*

*Land Revenue Regulation, section* 79, *para* 2—*Ejectment—Defence of right of permanent occupancy—Are-kandayam tenure.*

In a suit for recovery of land the defendant pleaded that he held the land on are-kandayam tenure and that he had acquired a right of permanent occupancy in the land.

*Held,* that as the origin of the tenancy was deposed to by witnesses and as no special agreement as to its duration or local usage in regard to it had been alleged or proved, the defendant was not entitled to permanent occupation of the land.

*Chick Bhadrappa* v. *Hanuma Reddi,* (*Mys. Ch. Ct., Second Appeal No.* 91 *of* 1901-02), *followed.*

SUIT for recovery of land. The Additional Munsiff of Bangalore decreed the plaintiff's suit.

The defendant preferred this Regular Appeal.

Mr. *B. V. Ramaswami Chetty* for the appellant.

Mr. *B. Ramanna* for the respondent.

JUDGMENT.—The defendant appeals against the decision of the Additional Munsiff of Bangalore, decreeing the plaintiff's suit for the recovery of the plaint land. The defendant contends that she has made out her case for holding the land as a permanent occupant. There is evidence to show that the defendant's father obtained the land under plaintiff's uncle on are-kandayam tenure and that he and defendant have so held the land for the last 30 or 40 years. But this does not appear sufficient to create a permanent right of occupancy under the provisions of section 79 para 2 of

* Regular Appeal No. 253 of 1903-04, against the decree of the Additional Munsiff of Bangalore in Original Suit No. 1178 of 1900-1901.

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the Land Revenue Regulation. According to this section, a permanent tenancy can be presumed only when, by reason of the antiquity of the tenancy, no satisfactory evidence of its commencement is forthcoming and there is no satisfactory evidence as to the duration of the tenancy either by agreement of parties or usage of the locality. In this case, the origin of the tenancy is deposed to by witnesses and no special agreement as to its duration or local usage in regard to it has been alleged or proved. The Munsiff is therefore correct in holding that defendant is not entitled to permanent occupation of the land. This decision is also in accordance with the ruling of this Court in *Chick Bhadrappa* v. *Hanuma Reddi*, Second Appeal No. 91 of 1901-02, where a tenancy on aro-kandayam tenure created between 1860 and 1870 was held not to carry a right of permanent occupancy.

The decision of the Munsiff is accordingly affirmed and this appeal is dismissed with costs.

## APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice A. E. Staley, Chief Judge, Mr. Justice A. Rangaswami Iyengar and Mr. Justice H. V. Nanjundayya.*

1904. March 31. August 10.

DODDA MUNIAPPA, APPELLANT, (PLAINTIFF)

*v.*

SESHA CHAR AND ANOTHER, RESPONDENTS, (DEFENDANTS).*

*Civil Procedure Code, sections* 100, 146 *and* 152—*Procedure when defendant does not appear—Verification of plaint—Decree on verified plaint without further evidence—"May proceed ex-parte," meaning of—Indian Evidence Act, section* 114—*Legality.*

In a suit for recovery of money due on a registered hypothecation bond, the defendants were treated ex-parte and the Munsiff passed a decree on the verified plaint alone without taking any evidence in the case. The question for consideration was whether the procedure adopted by the Munsiff was legal.

*Held,* (Justice RANGASWAMI IYENGAR *dissenting*) that where the defendant had been duly served with notice of the terms of the plaint and did not appear on the date fixed for hearing and the Court considered no further evidence necessary, the Court could proceed to give judgment upon the plaint without further evidence.

* Regular Appeal No. 159 of 1903-04, againt the decree of the Munsiff of Chickballapur in Original Suit No. 7 of 1903-04.

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*Held also*, that the term "may proceed" in section 100 of the Civil Procedure Code did not necessarily mean that the Court may proceed to record evidence and that it might equally mean that the Court may proceed to record judgment ex-parte.

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SUIT on a hypothecation bond. The Munsiff of Chikballapur passed a decree making the 1st defendant and hypothecated properties alone liable for the plaintiff's claim.

The plaintiff preferred this Regular Appeal.

Messrs. *D. Venkataramayya* and *M. Ramachandra Rao* for the Appellant.

The Respondents being absent.

This Regular Appeal first came on for disposal before their Honors Mr. Justice A. Rangaswami Iyengar and Mr. Justice H. V. Nanjundayya who delivered the following Judgments.

Mr. Justice A. RANGASWAMI IYENGAR:—The plaintiff brought this suit for balance due on a registered deed of hypothecation executed by the 1st defendant and one brother who is absent and has therefore been left out. The 2nd defendant is another brother and has been included as a defendant on the grounds that he, 2nd defendant, is undivided and that the debt was contracted by the 1st defendant as manager of the joint family. The relief sought is for a decree against the 1st defendant, the hypothecated property and other joint property of the 1st and 2nd defendants.

The defendants absented themselves though served and were treated ex-parte. The Munsiff read the verification in plaint and decreed the plaintiff's claim with costs against 1st defendant and the hypothecated properties.

The plaintiff has appealed on the grounds that the Munsiff erred in not passing a decree against other family property and 2nd defendant also as the debt had been contracted by the 1st defendant as manager of a joint Hindu family.

On the allegations contained in the plaint, the plaintiff is entitled to a decree making the hypothecated property as well as other family property belonging to the 1st and 2nd defendants liable to the decree. (*See* Art. 333, Mayne's Hindu Law p. 419, Sixth Edition).



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But as the Munsiff has passed the decree relying upon the plaint verification alone, it has to be considered whether his procedure is correct and his decision may be upheld. Sec. 100 para (a) of the Civil Procedure Code provides that if it is proved that the summons was duly served on the defendant, the Court may proceed *ex-parte*. The meaning of the words *ex-parte* and the procedure to be followed are not laid down in the Civil Procedure Code. The words themselves signify "on one side" or without the other party, and the provision in question would mean that the Court may proceed with the case in the absence of or without the defendant. But the Code does not specify any where what further action should be taken by the Court; chapters 8 to 15 relate to procedure to be adopted when the parties on both sides appear and admit or deny the allegations on either side. Even section 157 in chapter 12 only provides that the procedure prescribed in chapter 7 shall be followed when the defendant fails to appear at an adjourned hearing. It is however clear that the Court cannot give a decree as per claim merely because the defendant is absent and the Court is permitted to proceed ex-parte. To do so there must be a special provision of law as in the case of the County Courts where if the defendant fails to appear in pursuance of a "default summons," the plaintiff's claim may be decreed without further evidence. But such summons can be issued only in certain classes of suits and on the application of plaintiff supported by *affidavit*. It may also be observed that section 90 of "the County Courts Act, 1888" provides for "due proof of the debt being due and owing" before Registrar can enter up judgment for the plaintiff when defendant does not appear and section 91 lays down that if defendants do not appear, the Judge upon due proof of service may proceed to the trial or hearing on the part of the plaintiff only * * *." Both from the wording of the section that the Court may proceed ex-parte and the absence of special provisions to the effect that the absence of the defendant shall be tantamount to an admission of the plaint claim and that it might be decreed without further enquiry and from the analogy of the procedure of the County Courts it must follow that the Court must hold some further enquiry as to the truth of the plaint allegations and the plaintiff's legal right to the relief sought. The only decided case that is available is *Taruck Nath Mullick* v. *Jeamat Nosya,* 5 Cal. 353. In this case, the defendant being ex-parte the Munsiff made a

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reference to the High Court of Calcutta whether the defendant having failed to appear though summoned to give evidence, the case can be decided against the defendant even when the plaintiff is unable to give any evidence in support of his claim. The Court remarked that "if the case is then ripe for proceeding with ex-parte under section 100, the plaintiff is entitled to succeed if he gives *prima facie* evidence in support of his claim," and that plaintiff should produce evidence in support of his claim. It may therefore be held that plaintiff in such a case is bound to produce some evidence in support of his claim.

The next point for consideration is whether the plaint verification may be regarded as evidence in support of the plaintiff's claim. There is no provision either in the Code of Civil Procedure or the Evidence Act with reference to the admissibility of a verification in evidence to prove the allegations the truth of which it affirms.

The object of the verification appears to be to ensure that the plaintiff does not make his allegations in the plaint recklessly and at random and that he takes due care to satisfy himself that they are true to the best of his knowledge and belief. But they can be admissible in evidence only either as admissions or statements made by the plaintiff under the circumstances and subject to the limitations prescribed in the Evidence Act. Under none of these provisions could the verified allegations be admitted as evidence when the plaintiff or the person who made the verification is alive and can be called as a witness. Even as regards affidavits, the Civil Procedure Code provides for their admission only as evidence of certain matters and that under certain conditions; and they become relevant in a case only under section 33 as evidence given by a witness in a judicial proceeding. There is also an important difference in the formality to be observed in making an affidavit as compared with the verification of a plaint which must affect the value of the latter as evidence. The plaint is not verified on solemn affirmation before a properly constituted officer and cannot be considered to be made under the same legal sanction or with the same formality as an affidavit. I am obliged to hold therefore that the Munsiff erred in admitting the verification as evidence.

I would accordingly set aside the Munsiff's decision and remand the case for fresh disposal. The costs will abide the result of the suit and the appeal stamp will be refunded,

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Mr. Justice H. V. NANJUNDAYYA.—On the merits of the appeal, I do not think that the plaintiff can get a decree against the brother whom he deliberately omitted to implead as a defendant in the case. He seems to have been ill-advised in leaving him out: and if he could not find this debtor's address, he could easily have obtained an order for some kind of substituted service.

2. Against the 2nd defendant in the case, the plaintiff was no doubt entitled to a decree in accordance with the allegations made in the plaint. There is nothing to show that the attention of the Munsiff was invited to this matter; and it is probable that if the plaintiff or his pleader had asked for it, a decree would have been passed, so as to bind both the defendants in the suit. This seems to have been an oversight: and as the defendants are ex-parte in this Court also, I would direct that the decree of the Lower Court be modified so as to make the family property of both the defendants liable. The appellant is not entitled to get his costs in this Court.

3. On the other question raised in the judgment of my learned colleague, I am not (as at present advised) inclined to go to the length of declaring that a decree passed as in this case on the strength of the allegations in the plaint alone is altogether invalid. Though the Judges in this State generally record some formal evidence before passing decrees in 'ex-parte' cases, I know that some Judges have often acted on mere verified plaints, in giving such decrees. We may, by our decision in the present case, prohibit such a course being adopted in future; but as we may render doubtful the validity of past Judicial acts, I think it is worth our consideration whether there is any method of justifying the procedure followed in this case.

4. Under section 58 of the Evidence Act, no fact need be proved in any proceeding, which, by any rule of pleading in force at the time, the parties thereto are deemed to have admitted by their pleadings. There is no general law of pleadings in force as far as I know: and rules of pleadings have to be collected from the general rules about presumptions, burden of proof and similar matters contained in the Evidence Act and elsewhere: and where there are no positive rules, we have to fall back upon ordinary logic and (in the words of section 114 of the Evidence Act) on our knowledge of "the common course of natural events, human conduct, and public and

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private business in their relation to the facts of the particular case." The defendants got a copy of the plaint; and the allegations made by the plaintiff therein are made by him under a feeling of responsibility; for, if he is shown to have made false statements, he would render himself liable to punishment, as severe as for giving false evidence. Bearing these facts in mind, the Judge may, I think, fairly presume that a defendant who having an opportunity of denying a claim deliberately omits to do so, has admitted it. Section 58 gives the Judge discretion to require proof even in cases where there is an express admission. He would certainly do well to require evidence in ex-parte cases, where the admission is only presumed. But it cannot be held to be illegal if he presumes the claim to have been admitted and proceeds to give a decree to the plaintiff.

Owing to a difference of opinion between their Honors, Mr. Justice A. Rangaswami Iyengar referred the case under section 575 of the Civil Procedure Code, to the Chief Judge Mr. Justice A. Ramachandra Iyer who passed the following

ORDER.—THE CHIEF JUDGE:—There is a difference of opinion between the learned Judges who heard this appeal Section 575 of the Code of Civil Procedure, as amended by Regulation VII of 1892, enacts that "when any of these provisions conflicts with those of the Mysore Chief Court Regulation I of 1884 as amended by Regulation II of 1890, the last mentioned provisions shall prevail." It is provided by the Chief Court Regulation that when "there is a difference of opinion on any material question, such question shall be referred to a Full Bench" (Regulation II of 1890, section 15 para 3). I order that the question be argued before a Full Bench and that notice of this order be given to the Advocates concerned after the re-opening of the Court in June.

This Regular Appeal then came on for hearing before the Full Bench constituted as above.

JUDGMENT.—THE CHIEF JUDGE:—The first question raised in this appeal for the consideration of the Full Bench is, whether a decree can pass on a verified plaint alone.

It is plain that it cannot so pass without further proceedings, for by the provisions of Chapter VI of the Civil Procedure Code, summons on the defendant must be issued and due service effected after the plaint has been duly filed. Where, however, the defend-

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ant has been duly served with notice of the terms of the plaint and does not appear on the date fixed for hearing, &c. and the Court considers no further enquiry necessary, I am of opinion that the Court can proceed to give judgment upon the plaint without further evidence. The wilful neglect of a defendant to plead within the time appointed by law may be taken to raise a presumption against him that he confesses the plaintiff's right of action under section 114 of the Evidence Act (Mr. Justice Amir Ali and Mr. Woodroffe's Evid: p. 703. Taylor on Evid: 8th Edition Vol. I, section 83). On this presumption the Courts of Law in England allow judgments to pass without further evidence where no further enquiry is considered necessary (Rules of Supreme Court Ord. XXVII 22 *et seq*, Ord. XIII under default in appearance. Forms in App. X A Pt. I). The term 'may proceed' in section 100, Civil Procedure Code, does not necessarily mean that the Court may proceed to record evidence. It may equally mean that the Court may proceed to record judgment ex-parte.

Again under section 146, Civil Procedure Code, the Court, when, at the first hearing, the defendant makes no defence, is not required to frame and record issues of fact and of law. It is only required to frame such issues when the parties are at variance on some material proposition affirmed by one party and denied by the other. When they are not at issue the Court *may* under section 152 at once pronounce judgment. It is obvious therefore to my mind that the Court is not *required* to proceed to record evidence when the defendant having notice of the suit does not oppose it. The remark at p. 356, I. L. R., Cal., Vol. V that the plaintiff is entitled to succeed, if he gives *prima facie* evidence in support of his claim, is merely an *obiter dictum*.

The next point is what decree should the plaintiff get? He has asked for a decree for sale of hypothecated property and in case the decretal amount be not satisfied, for a further personal decree against defendant No. 1 alone, and against the joint family property of defendants 1 and 2. The claim being unopposed, I think he should get such a decree.

I do not think the plaintiff should get costs in this appeal, since the proceedings in this Court were not due to any fault of the defendants.

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Mr. Justice H. V. NANJUNDAYYA:—I agree to a decree as proposed by the learned Chief Judge being passed in this case. My reasons are already stated in my former judgment.

Mr. Justice A. RANGASWAMI IYENGAR:—I have had the benefit of reading the judgment of the learned Chief Judge but regret to say that I am not yet convinced that a Court can pass a decree when the defendant fails to appear after service of summons, without any evidence. The learned Chief Judge appears to have omitted to consider the question whether a verification of a plaint can be used as evidence of the claim because he thinks that the Court might presume from the wilful neglect of defendant to plead within the time appointed by law that he confesses the plaintiff's right of action under section 114, Evidence Act. This section provides that the "Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of . . . . human conduct." From this is deduced the general presumption that "a party intends the natural consequences of his acts." But what is the natural consequence of the defendant's absence? According to the order of the Supreme Court referred to, the writ is issued to the effect that if defendant did not enter appearance, the plaintiff may proceed with the action and judgment be given in the absence of the defendant. And the orders provide that after affidavit of service of the writ, the plaintiff might enter judgment (p. 358 Vol. I, Daniell's Chancery Practice). By the nature of these orders, the defendant is made aware that judgment would be passed against him without further evidence. But the summons issued under the Civil Procedure Code does not contain an intimation that the judgment would be passed without any enquiry. On the other hand, the summons gives notice, that, in default of defendant's appearance, "the suit will be heard and determined in your absence." The natural consequence of the defendant's absence, known to or intended by him, would only be that the case would be heard and determined in his absence. This cannot justify the presumption that, by his absence, he admitted the claim, or that he understood that it would be so presumed.

In this respect, there appears to be a material difference between the procedure in England under the Supreme Court orders and our Civil Procedure Code. Under the former no action goes before a

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Judge or is tried by him until it is formally contested by the defendant. The plaintiff and defendant are thus intended to protect their respective interests to a much greater extent than in our Code. Here the Judge has to see before entertaining the plaint that the claim is a legal and cognizable one. Thus even if the defendant does not appear and contest the case, the Court has to see whether the claim is in time and true and whether the plaintiff is entitled to a decree. The conditions being thus different, what would be a good legal presumption according to English Law and Procedure need not be a legitimate one in India. In Taylor on Evidence under the general observation that "the presumption that a party intends the natural consequences of his acts extends to civil as well as criminal responsibilities." it is given as an illustration that "the wilful neglect of a defendant to plead within the time appointed by law is taken conclusively against him, as a confession of the plaintiff's right of action." But in the commentaries on the Evidence Act by Amir Ali and Woodroffe, only the former is quoted and not the latter. Though in the foot-note to the above in Taylor on Evidence, the Supreme Court order on the subject is referred to with the remark that the principle of the order belongs to general Jurisprudence, the omission of this as an illustration to section 114 and in the above commentaries on this section shows that it was *not* a presumption which could be acted upon in Indian Procedure. Moreover, in the illustrations to section 114, there is none similar to the presumption now proposed to be applied.

In this case, the plaintiff's suit is based upon a deed of hypothecation and its execution is a material issue. It may be assumed for the sake of argument that the Court may presume from the wilful absence of the defendant that he does not care to contest the suit. But can it be justly argued that such absence also amounts to an admission of the genuineness of the document and of all the other facts necessary to entitle the plaintiff to a decree. It seems to me that it would be stretching too far the discretion vested in a Court by section 114. Under section 101, Evidence Act, the plaintiff must prove the execution of the document before he can succeed in his suit and I am still inclined to think that the absence of the defendant does not amount to an admission that it is genuine. In the present case, the defendants happen to have executed the document. But suppose the defendants are representatives of the exe-

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cutant of the document, would it be right to infer that, because they did not care to contest the suit, the document was genuine and the claim a true one and such as could be decreed without any enquiry?

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Section 43 of Act IX of 1850 (Presidency Small Cause Court Act) provides that if defendant fail to appear, "the Judges . . . in their discretion may proceed to the hearing on trial of the cause on the part of the plaintiff only" . . . . . . and in section 111 of Act VIII of 1859 which corresponds to section 100 of Acts X of 1877 and of XIV of 1882, the words are "the Court shall proceed to *hear* the suit ex-parte." Unless the latter wording that "the Court may *proceed ex-parte*" was deliberately introduced to do away with any hearing or trial of the suit, it would seem that some enquiry or trial was intended by the Legislature before a decree can be passed and the mere absence of the defendant could not have been considered sufficient as an admission of the claim.

## APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice H. V. Nanjundayya.*

IN APPEAL NO. 54.

VENKATAKRISHNIENGAR, APPELLANT, (PLAINTIFF)

*v.*

DOD RAMASWAMY AND 37 OTHERS, RESPONDENTS, (DEFENDANTS NOS. 1, 3, 4, 39, 2, 5 TO 10, 11, 12 TO 20, 22, 23, 25 TO 28, 30 TO 35, 40, 41, 37, 38 AND 29).

1904. August 11.

IN APPEAL NO. 99.

CHICKKA MUDDAPPA, APPELLANT, (DEFENDANT NO. 3)

*v.*

VENKATAKRISHNIENGAR AND 4 OTHERS, RESPONDENTS, (PLAINTIFF AND DEFENDANTS NOS. 1, 2, 4 AND 39).*

*Civil Procedure Code, sections 276, 305—Execution of decree—Attachment of property—Private Sale of attached property—Conditions of section 305, C. P. C. unfulfilled—Effect on sale.*

Where property was under attachment in execution of two decrees, the judgment-debtor with the permission of the Court to effect a private sale,

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Regular Appeals Nos. 54 and 99 of 1901-02 against the decree of the Sub-Judge of Mysore in Original Suit No. 54 of 1898-99.



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sold the property to plaintiff. Out of the purchase money, plaintiff paid into Court only the amount required to satisfy the decrees of the attaching creditors and the balance was paid to the judgment-debtor. But confirmation of sale by Court was not obtained by the parties. In a suit for the recovery of the property brought by the purchaser it was contended that as the transaction of sale was not confirmed by the Court, it was ineffectual to convey the property to plaintiff and that he had only a lien on it to the extent of the amount actually paid by him to satisfy the decrees together with a fair rate of interest thereon.

*Held*, that a transaction not fulfilling the conditions of the two provisoes (of section 305, Civil Procedure Code) could be only subject to the limitation to the general right of transfering property contained in section 276 C. P. C. and as the decrees for which the property had been attached had been both satisfied, the sale could not be declared void and ineffectual.

SUIT for land. The Sub-Judge of Mysore held that the plaintiff was not entitled to the entire property but only to an equitable moiety of it at a fair partition between himself and the 39th defendant.

The plaintiff and the defendant No. 3 preferred these Regular Appeals.

Messrs. *L. Sreenivasa Iyengar* and *B. Ramanna* for the appellants.

Messrs. *J. C. S. Lawrance* and *S. Narayana Rao* for the respondents.

JUDGMENT.—The circumstances of the case, out of which these two appeals arise, are these:—

The property in respect of which the present suit No. 54 of 1898-99 is brought admittedly belonged originally to the 1st defendant Dodda Ramaswami. In execution of decrees against him this property was attached on the 11th September 1892. Thereupon, he next day executed a deed of sale of the property in favour of defendant No. 2 Basavayya, on condition that the latter should satisfy the decretal debts. This condition was not complied with by that defendant. The 3rd defendant Chicka Muddappa held a mortgage over this and other property to secure Rs. 9,000 under a bond executed by defendant No. 1 dated the 22nd October 1891. His claim in the execution proceedings was contested by the plaintiff and defendant No. 1; and defendant No. 3 withdrew his claim in order to bring a regular suit which he has, however, not yet filed. One of the decree-

holders applied for sale of the attached property; and the defendant No. 1, with the authority of the Court under section 305, Civil Procedure Code, sold the property in suit under deed dated 16th February 1894 in favour of the present plaintiff. On the 21st February 1894, the name of H. Krishnamachar, father (since deceased, in 1895) of defendant No. 39 S. Narasimhachar and the latter's elder brother Ranga Sreenivasachar, was inserted in the deed also as vendee, and defendant No. 1 signed the addition. In accordance with the bond, the decretal amount was paid into Court by the plaintiff on the 27th February 1894, and the document was registered next day. But on the 1st March 1894, the defendant No. 1 again sold the property to his father-in-law defendant No. 3. On the 18th November 1895 defendant No. 2 executed a release, in favour of the plaintiff, in respect of his interest in the property. On the 18th April 1895, H. Krishnamachar was murdered; and then his eldest son Ranga Sreenivasachar applied for himself and defendant No. 39 for a certificate to collect debts due to their deceased father. The certificate was granted on the 21st August 1895. On the 31st July 1895 Sreenivasa Rangachar, maternal uncle of defendant No. 39, as guardian for defendant No. 39 filed a partition suit against Ranga Sreenivasachar; and in the plaint did not claim for the minor a share in the property in suit, but did claim a debt of Rs. 7,000 as due from the plaintiff. On the 6th August 1896, while this suit was pending (it still is pending), Ranga Sreenivasachar executed a deed of release to plaintiff in respect of the property in suit. It was rejected when tendered for registration, as tendered beyond time. Thereafter, on the 3rd June 1897, he again executed a similar deed of release (exhibit B in this suit) which was registered. This deed of release recited that the father of the executant and defendant No 39 had no interest in the property in suit and purported to be executed on behalf of Ranga Sreenivasachar and defendant No. 39. The plaintiff has sued, claiming the whole property on the strength of the deed of sale dated 16th February 1894 (exhibit A), the release by defendant No. 2 (exhibit AL), and the release by Ranga Sreenivasachar (exhibit B) with mesne profits.

3. The learned Subordinate Judge has decreed the plaintiff's suit so far that he has found the plaintiff to be entitled to possession of an equitable moiety of it on a fair partition between himself

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and defendant No. 39: but has otherwise dismissed the suit, and directed the plaintiff should bear his own costs and half the costs of defendant No. 39.

4. Against this decision, the plaintiff in Appeal No. 54 has appealed on the ground that his suit should have been decreed in full. In Appeal No. 99 Chikka Muddappa, defendant No. 3 has appealed and urged that the plaintiff's suit should have been altogether dismissed. In Civil Petition No. 141 the 39th defendant has applied for an order for further inquiry on the ground that the petitioner has, only during the pendency of the suit now under appeal, come to know of the existence of certain evidence which was suppressed by his elder brother Ranga Sreenivasachar and the evidence may be of importance as showing that the plaintiff obtained money from the petitioner's father to pay for the land in suit.

The defendant No. 3 being in possession, his appeal being against the plaintiff upon the whole of plaintiff's title, it is convenient to first deal with Appeal No. 99.

The plaintiff claims under a private sale requiring the express sanction of the Court and subject to the provisions of section 305, Civil Procedure Code. Under those provisions, he was bound to pay all monies payable under such sale into Court and not to the judgment-debtor, and he could not acquire an absolute title until the sale should be confirmed by the Court. He obtained the Court's sanction to the sale; or the Court did sanction the sale. But he did not pay all monies payable under the sale Rs. 7,000 in all, into Court. He paid only the decretal amount Rs. 2,400 into Court. He has deposed stating that he paid Rs. 2,300 out of the Rs. 7,000, the day before execution of the sale deed, to the judgment-debtor, defendant No. 1; and the balance of the sale money he paid to the debtor in March nearly a month later. Thus he acted in contravention of the express provisions of section 305, Civil Procedure Code, under which the sale was permitted. The decretal amount being paid into Court, the Court ordered it to be received, observing that the sale was effected on the authority of a certificate of the Court under section 305, Civil Procedure Code. But the plaintiff never applied for confirmation of the sale and the Court never passed an order, declaring the sale to have become absolute.

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5. The third defendant's claim to have his mortgage recognized was rejected by Court on his withdrawal; and as he never filed a regular suit to have it established, the order declining to recognize it became conclusive against him. He cannot therefore fall back upon his rights under it. The sale on which he relies was subsequent to the plaintiff's; he has not made a serious attempt to prove that it was a genuine *bona fide* transaction; and the testimony of his witnesses, who say that the plaintiff admitted the nominal character of his own sale, and allowed him to make this purchase, is not worthy of belief. In fact, he relies more upon his contention that the sale to the plaintiff is invalid.

6. The sale to the 2nd defendant is stated to have been an uncompleted transaction, and whatever its force may be, the plaintiff having obtained a release from him, his claim is unaffected by reason of this prior sale.

7. The Lower Court has come to the conclusion that the plaintiff paid no more than Rs. 2,405-3-7, as consideration for sale deed exhibit A. After considering all the evidence in the case, we accept this conclusion as correct.

8. The release in favour of the plaintiff by the 39th defendant's brother was given on the ground that his father was only a nominal party to the transaction, and was never meant to have any share in the property purchased. It is in fact more an acknowledgment or admission of the plaintiff's sale title to the property than a release. It was not also without consideration, for Ranga Sreenivasachar admits that he got a bond from the plaintiff for the amount actually due to Hundi Krishnamachar. Taking the relation of the brothers at the time into consideration, the Lower Court has correctly found that the admission or release cannot bind the minor brother, or affect his interest.

Though it is probable that the whole or the bulk of the money paid into Court was advanced by Hundi Krishnamachar, there is no satisfactory evidence to show on what terms this was done, or how the account was subsequently adjusted. The proper conclusion, therefore, is that the two persons entered in the deed as purchasers were equally interested in the transaction. The 39th defendant is therefore entitled to claim a quarter share in the concern, the re-

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maining quarter going to the plaintiff on the strength of the release by Ranga Sreenivasachar.

9. The only remaining question is what interest did the purchasers acquire under exhibit A. The property sold was under attachment, and the judgment-debtor had obtained a certificate under section 305, Civil Procedure Code, authorising him to dispose of the property by private alienation. No part of the purchase money except the amount paid for the satisfaction of the decrees for which the attachment had been effected, was paid into Court; and it is admitted that the plaintiff never asked for or obtained an express confirmation of the transaction by Court. It is contended that the sale is on this account quite ineffectual to convey the property to the plaintiff, and whether the plaintiff has only a lien on it to the extent of the amount actually paid by him to satisfy the decrees, together with a fair rate of interest thereon. If it were not for express limitations introduced by law, the sale to the plaintiff would have to be viewed as binding between the same parties like any other transaction into which they have deliberately entered. Section 276 of the Code introduces an express limitation on the power of an owner to dispose of his property, while it is under attachment. The limitation is not that the sale itself cannot take place, but that it shall be void as against all claims enforceable under the attachment. This is all that the context requires, and the Code being concerned only with securing the interest of attaching creditors could not go further. If the creditor wished to enter into a private bargain to raise the money to satisfy the decree, this provision of the Code would be in his way, and persons likely to pay him money would be deterred from doing so in ordinary circumstances. To give facilities to the debtor to raise money by private negotiations, and to safe-guard the interest of the intending purchasers, section 305 gives power to the Court to remove this restriction on two conditions, namely, that all moneys payable under the decree shall be paid into Court, and that the sale, &c., should be subject to confirmation by the same authority. What is the effect of these conditions not being fulfilled? It cannot be that the sale is altogether void, for it is nowhere so laid down either in this section or elsewhere. These two conditions are in fact attached only to the second clause of this section; and in the event of their not being fulfilled, the only consequence can be that the antecedent clause

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will not apply. The provision is intended to give a certain privilege or rather facility to the judgment-debtor and the intending purchaser; and it cannot be a valid deduction therefrom that the owner's power to alienate the property (subject only to the provisions of section 276) can be taken away thereby. In fact, the word absolute itself probably shows that no general disability is introduced by this provision. Absolute means unconditional, or absolved from limitation. The limitation to the general right of transferring property that is mentioned in the section is that of section 276 of the Code; and it is only to that, that a transaction not fulfilling the conditions of the two provisoes can be subjected.

10. Applying this conclusion to the case, we find that the decrees for which the property had been attached have both been satisfied. The sale cannot therefore be attacked under section 276. The 1st defendant has not pleaded want of consideration, and it is proved that the plaintiff has actually paid part of it. The contract of sale being duly completed, cannot now be declared as void, merely on the ground that a part of the purchase money has not been paid. It is not alleged or proved that full payment was a condition precedent to the passing of the property to the plaintiff. The 1st defendant has a right to recover the balance in any manner he considers proper. He may probably do so (it seems to us) notwithstanding this suit, for the matter is not directly in issue at present; but whether or not this suit will act as an estoppel against him, we cannot say that the sale can be declared ineffectual on that account.

11. The plaintiff has not proved what mesne profits he is entitled to. The lands seem to have lain waste more or less. The disallowance of mesne profits was therefore right.

12. For the foregoing reasons, we modify the decree of the lower Court by declaring that the plaintiff is entitled to three-fourths and the 39th defendant one-fourth of the lands in dispute, and that they are entitled to recover possession from the other defendants, without prejudice, however, to the right of the vendor to recover any balance of purchase money if otherwise due. In case, the two persons entitled do not agree between themselves, the plaintiff may get possession of the whole, subject to giving the 39th defendant a quarter share of the lands, and of any profits he may

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hereafter derive from them. The 39th defendant is not entitled to get actual partition made in this suit.

13. The third defendant's Appeal (No. 99) should be dismissed. The petition of the 39th defendant for admission of further evidence is likewise rejected.

14. In the complicated circumstances of this case, all the parties should bear each his own costs, in both the Courts.

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## APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice H. V. Nanjundayya.*

1904. August 26.

RAMIAH, APPELLANT, (PLAINTIFF)

*v.*

BHAGIRATHAMMA AND 16 OTHERS, RESPONDENTS, (DEFENDANTS).*

*Civil Procedure Code, sections 375, 462—Guardian—Minor—Compromise made by mother on behalf of her minor son—Razinama decree—Suit to set aside decree—Leave of Court to compromise not expressly obtained—Burden of proof—Decree containing matters not the subject of suit.*

In a suit against a minor son, the mother as his guardian assented to a Razinama and the same was accepted by the Court and a decree passed thereon. The son after attaining majority brought this suit to set aside the decree alleging that 1st defendant had practised fraud on his mother. The suit was dismissed by the Court of First Instance on the ground that the allegation of fraud was not proved. In appeal, the plaintiff contended that the Razinama decree should be held altogether void, because it was not shown that the Court ascertained whether the terms of the Razinama were beneficial to the interests of the minor, and also because the decree dealt with matters not then in suit.

*Held,* that the burden of proving that the Court did not consider, approve and sanction the terms of the compromise lay on the plaintiff and as the same had not been discharged, the plaintiff was not entitled to have the decree set aside.

*Held further,* that in the present case it was impossible to put the parties back in *statu quo, i.e.,* to the position in the original suit and therefore, following the principles set forth in I. L. R , 9 Bom. 365 and I. L. R., 20 All. 98, the plaintiff was also not entitled to have the decree on compromise declared void.

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* Regular Appeal No. 231 of 1901-02, against the decree of the Sub-Judge of Mysore, in Original Suit No. 8 of 1898-99.

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*Nirvanaya* v. *Nirvanaya, I. L. R.*, 9 *Bom.*, 365; *Aman Singh* v. *Narain Singh, I. L. R.*, 20 *All.*, 98, *followed.*

*Rajagopal Takkaya Naiker* v. *Muttupalem Chetti, I. L. R.*, 3 *Mad.*, 103; *Jutadhari Lal* v. *Rughoobeer Persad, I. L. R.*, 9 *Cal.*, 510; *Karmali Rahimbhoy* v. *Rahimbhoy Habibbhoy, I. L. R.*, 13 *Bom.*, 137; *Arunachalam Chetty* v. *Meyyappa Chetty, I. L. R.*, 21 *Mad.*, 91; *Virupakshappa* v. *Shidappa and Basappa, I. L. R.*, 26 *Bom.*, 109, *commented on.*

*Sinaya Pillai* v. *Munisami Ayyan, I. L. R.*, 22 *Mad.*, 289, *referred to.*

*Held also*, that in view of the ruling in 24 Cal. 908, the contention that the decree should be set aside as it embodied matters not then in suit was unsound and that the compromise was rightly embodied in the decree.

*Brojodurlabh Sinha* v. *Ramanath Ghose, I. L. R.*, 24 *Cal.*, 908, *followed.*

SUIT to set aside a Razinama decree. The Sub-Judge of Mysore dismissed the suit.

The plaintiff preferred this Regular Appeal.

Mr. *B. Nanjundappa* for the appellant.

Messrs. *K. T. Narasimha Iyengar, M. B. Varadaraja Iyengar* and *B. Sreenivasa Iyengar* for the respondents.

JUDGMENT.—This is an appeal against the decree of the Subordinate Judge of Mysore in O. S. No. 8 of 1898. The appellant in this suit has sued to set aside the razinama decree alleged to have been obtained by defendant No. 1, by misrepresentations and mistake against plaintiff's mother as his guardian in O. S. No. 358 of 1879 in the said Court, for recovery of plaintiff's half share in the scheduled immoveable properties and for produce for 18 years or the value thereof, estimated at Rs. 43-2-3. The other defendants are purchasers since the said decree was passed. The 1st defendant denied that the razinama decree was tainted by fraud, mistake or misrepresentation and pleaded that it was legal and binding on the plaintiff. The other defendants raised further pleas that they were bonafide purchasers for value, that, against certain defendants,



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the plaintiff was estopped and that, with reference to property No. 20 of the schedule attached to the plaint, the plaintiff's suit was *resjudicata*. The 1st issue settled in the case was "Is the razinama alluded to, in the plaint, void, by reason of fraud, mistake and misrepresentation; is it invalid, and is it or the decree based thereon not binding on the plaintiff?" The learned Sub-Judge found against the plaintiff on this issue, and without entering on the other issues, dismissed the plaintiff's suit. Against this decision, the plaintiff has appealed to this Court. The plaintiff was unable to prove that the razinama was procured by any fraud or misrepresentation. On the contrary, there was no doubt that the plaintiff's mother and guardian acted, in good faith, for the interest of the minor in giving up certain of his ancestral properties to satisfy a debt of over Rs. 3,000, due upon assets received from plaintiff's deceased father, and to avoid further litigation, and expense. Owing, however, to a miscalculation of both parties, which cannot, after the lapse of so many years, be explained a debit of Rs. 553 was, by mistake, shown against the plaintiff.

It is urged, in appeal, that the decree on the razinama, should be held altogether void on the authority of several rulings, because it is not shown that the Court ascertained whether the terms of the razinama were beneficial to the interests of the minor; that the Court did not record the fact that application for leave to compromise, was made to it or that the terms were considered by the Court or that the Court granted the leave, having regard to the interest of the minor under section 462, Civil Procedure Code. In the present case, all that the record shows, is that the parties applied for time to file a razinama; that this was allowed; that the parties did file a razinama; that the Court accepted it, and passed a decree in its terms. We may briefly refer to the rulings on the subject. In the case, I. L. R., 3 Mad., p. 103, objection was taken on behalf of a minor in execution of a decree upon a compromise that the mere embodiment of the compromise in the decree was not a sufficient compliance with the provisions of section 462, Civil Procedure Code. The High Court on appeal, held, that the words 'leave of the Court' in section 462 by implication required the Court to consider whether the proposed compromise should be sanctioned. This not having been done, the Court ordered a new trial of the original suit.

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This ruling was followed in the case, I. L. R., 9 Cal., p. 510 and a new trial was directed to ascertain how far the debt as to which there had been compromise, was binding upon the minors. The suit in which this decree was passed was a suit to set aside the decree upon the compromise.

In the case reported at p. 137 I. L. R., 13 Bom., it was held that the Court alone had authority to sanction an arrangement when an infant is a ward of Court, however beneficial it might be to the infant and that a decree not passed with express sanction, must be set aside at his instance.

These rulings were, again, followed in the case reported at p. 531, I. L. R, XVII Mad., and the original suit, it was directed, should be tried on its merits. The Court further expressed an opinion that a Court ought to record the fact of application for leave to compromise being made to it, of its considering the terms and of its granting leave, having regard to the interest of the minor. It was not, however, held, that if such record were not made, the decree must, *ipso facto*, be set aside.

The ruling at page 91, I. L. R., 21 Mad., followed the ruling I. L. R., 3 Mad., p. 103, already referred to.

The same principle was affirmed in a case reported at page 109, I. L. R., 26 Bom. It was then held that there must be something to show that the Court had all the terms of the compromise brought fairly to its notice and that the Court assented to those terms.

In all these cases, where the plaintiff sought to have a decree passed during his minority on compromise by his guardian set aside, it appears to be presumed that, unless the Court passing the decree on compromise, has expressly in writing recorded that it has considered the terms of the proposed compromise and sanctioned them in the interests of the minor, the Court has not so acted and has not granted leave within the meaning of section 462, Civil Procedure Code. The obvious comment which suggested itself is that, in the absence of any provision of law, requiring such record, the ordinary presumption of law, must prevail that a Court has properly exercised its discretion and jurisdiction as provided by law (s. 114 (*e*) Evidence Act). In the case now under consideration, it appears from the record that the Court granted time to the parties to file a razinama,

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accepted it when filed, and passed a decree in accordance with it. The burden of proof, therefore appears obviously on the plaintiff who has to show a good cause of action, to show that the Court did not consider, approve and sanction its terms. This burden the plaintiff, has not, in fact, discharged, and therefore, on this ground, the plaintiff is not entitled to have the decree set aside. In a case reported at p. 365, I. L. R., Bom., Vol. IX, it was held that where a compromise having for its object to put an end to litigation, was under the circumstances, for the benefit of the minor, it was, when made by the natural guardian of the minor even without any sanction of the Court, a good and valid compromise binding the minor, and should be enforced.

The ruling I. L. R., 20 All., p. 98 was upon the same principle and was extended to cases in which it had become impossible to put the parties back in *statu quo*. In the present case, owing to changes in a long lapse of time, it is impossible to put the parties back in *statu quo*, that is, to the position in the original suit, and with reference to the property in suit which they occupied immediately before the decree on compromise was passed in O. S. No. 358 of 1899. Upon the principles set forth in these two rulings, the plaintiff is also not entitled to have the decree on compromise, declared void.

In the ruling last quoted, the learned Judges of the Allahabad High Court have drawn a clear and proper distinction between a case in which the validity of a decree made upon a compromise in a suit in which a minor is a party, is challenged in appeal, (or, they might have added in execution) from that decree, and a case like the present where the validity of a decree which has become final, is sought to be questioned in a separate subsequent and independent suit between the parties. The reason given for the distinction is that to hold the contrary would be to open the door to ruinous litigation. That is a sound utilitarian, but hardly a legal reason. The real essence of the distinction is that, in the original suit, everything requisite, must be done, and proved by the opposite party to be done before the decree should become final against him. But in a suit to avoid liability on a final decree as well as on an agreement made by his guardian of which he has had the benefit, passed against a minor, the latter

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must, like any other plaintiff, prove his cause of action, and that he is entitled to relief.

Assuming that plaintiff had made out in the present suit, that the compromise decree was passed by the Court without proper consideration, and that it was in consequence voidable under the terms of section 462, Civil Procedure Code, the plaintiff could only succeed on condition of restoring any benefit, thereunder received by him, to the person from whom he received it, (I. L. R., 22 Mad., p. 289), or in other words, of restoring the *statu quo* immediately before the compromise decree was passed. He has, however, not applied to have the liability for debts extinguished, by the compromise decree revived, or that the suit should be restored and proceed against him; and he is not likely to make such application. He seeks to recover the property given to release him from that liability and that litigation with damages and without offering any restoration. In our opinion, he is not entitled to do this, (Cunningham and Sheppard's Contract Act, under section 64).

It is urged for the appellant that the razinama decree dealt with matters not then in suit in recording the terms of the compromise as to the plaintiff's property which was not in suit; and that the decree should, consequently be set aside. In view of the ruling I. L. R., 24 Cal, (F. B.) p. 908, Exp. p. 914), we do not consider this contention sound and we hold the compromise was rightly embodied in the decree.

At the hearing, it has been admitted that a sum of Rs. 553 was, by mistake, debited to the plaintiff in taking accounts on which the razinama was filed. We think, though with some hesitation, that the plaintiff should have a decree to recover this amount, we must assume, since the razinama was filed by both parties in the original suit, that this debit was due to a mistake of both parties and therefore, we do not allow any interest in respect of it.

The plaintiff will get a decree for Rs. 553 against defendant No. 1 with proportionate costs in the original and this Court. His appeal is otherwise dismissed with costs against all the defendants except defendant No. 1. We do not allow this defendant's costs, because we have allowed no interest against her.

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## APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

1904. August 27.

NARAPPA, APPELLANT, (DEFENDANT)

*v.*

RAMAYYA AND ANOTHER, RESPONDENTS, (PLAINTIFFS).*

*Indian Contract Act, section 56—Suit for rent—Compulsory evacuation of shops by Plague Authorities—Tenancy how affected.*

The defendant who had taken up some mandi shops from plaintiffs on rent was forced to evacuate them by the Plague Authorities under an order of Government. When the plaintiff sued for arrears of rent the defence was that the liability to pay rent had ceased as the defendant was not in possession of the shops.

*Held*, that the occupation of the shops became impossible by reason of the order of the Plague Authorities insisting upon their evacuation, and therefore the tenancy really came to an end when they were ordered to be evacuated.

*Merwanji Mancherji Cama* v. *Syed Sirdar Ali Khan, I. L. R.*, 23 *Bom.*, 510, *distinguished.*

SUIT for rent. The Additional Munsiff of Bangalore passed a decree in favour of plaintiff.

The defendant preferred this Regular Appeal.

Mr. *L. Sreenivasa Iyengar* for the appellant.

Mr. *B. Nanjundappa* for the respondents.

JUDGMENT.—The plaintiff sues for the arrears of rent of two mundy shops from 1st July 1899 to 15th June 1900. It is admitted that one shop had been held for some years on a tenancy which may be assumed to be a monthly tenancy and that the other was taken under a written lease on 8th March 1899 for 11 months.

The defence, so far as it is material for the purpose of this appeal, is that both shops were vacated in August 1899 by order of the Deputy Commissioner under the Plague Regulations and the

* Regular Appeal No. 102 of 1903-04, against the decree of the Additional Munsiff of Bangalore in Original Suit No. 356 of 1901-02.

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defendant could not make any use of the shops and that, as regards the shop taken under the written lease there is a clause in it, exempting defendant from liability in the contingency which has happened.

The Munsiff held that the clause had been interpolated subsequent to suit and that, as the defendant did not cancel his lease and surrender the shops, the tenancy was not terminated by the evacuation of the shops by order of the Plague Authorities and awarded the plaintiff arrears of full rent for one shop for the whole period of suit and arrears at the full rate of the other shop up to the end of the term of 11 months and at Rs. 5 per month for the remaining period.

The only disinterested witness to the written lease does not speak to the insertion of the disputed clause in the lease. We agree with the Munsiff in considering that the other witnesses are interested and that their evidence cannot be believed. We accordingly endorse the Munsiff's finding that the clause is an interpolation.

The only other question for consideration is, whether the action of the Plague Authorities relieved the defendant of his liability to pay the rent. The point is not free from difficulty. The Munsiff relying upon the decision of the Bombay High Court in *Merwanji Mancherji Cama and another* v. *Syed Sirdar Ali Khan,* I. L. R. 23 Bom., 5!0 held that defendant was liable. In that case Mr. Justice Fulton treated the plea of the compulsory evacuation of the premises by the Plague Authorities as one of breach of contract on the part of the lessor and held that, as it was enforced by a provision of law, the plaintiff could not be held guilty of breach of covenant for quiet enjoyment, and that as the defendant had not provided for the contingency by a special condition, he was liable to the plaintiff's suit. The case may be distinguished from the present one inasmuch as only a part of the premises included in the lease had been evacuated temporarily for disinfection and had been subsequently occupied by the defendant. Further, the learned Judge appears to have followed the principles of English Law in this respect. But the provisions of section 56 of the Con- ··ct Act have not copied the English precedents entirely. Para ꞓ the section provides that 'A contract to d. an act, which,

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after the contract is made, becomes impossible or . . . . unlawful, becomes void, when the act becomes impossible or unlawful. The undertaking of the defendant in this case, was the occupation of the shops for rent and this became impossible by reason of the order of the Plague Authorities insisting upon their evacuation. Thus, the facts of the case appear to fit in, with the conditions of the section. And in Sheppard and Cunningham's commentaries on this para, it is observed, "a rule is laid down in general terms and for all cases, which is declared in the English Authorities as exceptional and applicable to particular cases only. It is to be observed that, the term here used is no longer 'impossible in itself' but simply 'impossible,' and therefore, it may be supposed that, when the act stipulated for becomes impracticable in the ordinary sense of the word, the contract becomes void." In this view, the defendant would seem to have a very reasonable defence to the plaintiff's claim. It is not denied that, neither the plaintiff nor the defendant could have access to the shops under the orders of the Plague Authorities, and the question in a practical way, is only, whether the plaintiff or the defendant should lose the rent value of the shops. As regards one shop, the tenancy was a monthly one and when it was ordered to be evacuated, his tenancy really came to an end, though he did not formally hand over the key of the shop. The plaintiff could have got the shop from the Plague Authorities as the owner, if he really cared to do so. As regards the other also, though the lease vested in defendant, his occupation of the shop was impossible, and, at the end of the period or even earlier, the plaintiff might have legally treated the contract as ended. It is therefore, not really a hardship to plaintiff to bear the loss of rent of those shops in these circumstances.

The decision of the Munsiff, must therefore, be modified and the plaintiff awarded rent only for the two months of July and August or Rs. 98 with proportionate costs in the lower Court. The parties will bear their own costs in other respects as defendant must be held to have set up a false defence in the lower Court and as the question has been disposed of on a difficult question of law in this Court.

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## APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

NARASIMHIAH, APPELLANT, (PLAINTIFF)

1904. August 29.

*v.*

HANUMAKKA AND ANOTHER, RESPONDENTS, (DEFENDANTS Nos. 1 & 3).*

*Malicious prosecution—Damages, suit for—Reasonable and probable cause, want of—Burden of proof.*

Plaintiff who was prosecuted by defendant No. 1 was convicted by the 1st Court and acquitted in appeal. In a suit to recover damages brought by the plaintiff against the defendants, the latter pleaded that there was reasonable and probable cause for the prosecution.

*Held,* that the conviction of the appellant by the Magistrate who heard the evidence and saw the witnesses was evidence of the strongest possible character of reasonable and probable cause.

*Bhadre Gowda* v. *Kalase Gowda,* 1 *Mys. Ch. Ct. R.,* 68, *approved.*

*Jadubar Singh* v. *Sheo Saran Singh, I. L. R.,* 21 *All.,* 26, *followed.*

Suit for damages for malicious prosecution. The Additional Munsiff of Bangalore dismissed the suit on the ground that the plaintiff failed to prove that the prosecution was malicious or without reasonable and probable cause.

The plaintiff preferred this Regular Appeal.

Mr. *B. Sreenivasa Iyengar* for the appellant.

Mr. *C. Krishna Murti* for the respondent.

JUDGMENT.—This is an appeal from a decree of the Additional Munsiff of Bangalore, dismissing the plaintiff's suit for damages for a false and malicious prosecution. The appellant, a dealer, was convicted by the Sub-Divisional Magistrate of Closepet, in Criminal

* Regular Appeal No. 77 of 1903-04, against the decree of the Additional Munsiff of Bangalore in Original Suit No. 563 of 1899-1900.



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Case No. 48 of 1897-98, on the prosecution of defendant No. 1, Hanumakka, of cheating: but was acquitted on appeal to the Chief Court. As pointed out in the ruling of this Court reported at p. 68 Volume I, M. C. C. Reports, in a suit for damages for malicious prosecution, the burden of proof is on the plaintiff to prove (1) that he is innocent, (2) that there was want of reasonable and probable cause for the prosecution, (3) that the prosecution was malicious; malice under circumstances being inferrible when the plaintiff has made out the first two propositions. In the case reported, there was no conviction at all. In the present case, the appellant was convicted by the Magistrate who heard the evidence and saw the witnesses. It has been held that such conviction is very strong evidence (2, N. W. p. 88; 3 Mad., H. C. R., 238), evidence of the strongest possible character (I. L. R., 21 All., p. 26) of reasonable and probable cause. With that opinion, we agree. In this case, the Magistrate, who saw the witnesses, believed them. The complainant, now defendant No. 1, there was evidence, informed a Police Officer very shortly after the affair, and this conduct of hers in challenging an enquiry by the Police, is not consistent with the theory that she deliberately concocted a false case against the present plaintiff. The complainant's case was that the appellant and other Mohamadans had cheated her, the latter having induced her to deliver silk of which, she was the exclusive owner to the appellant who then paid these Mohamadans. The two Mohamadans tried with appellant pleaded that they were her partners. The Chief Court acquitted the appellant and the Mohamadans on the ground that the complainant's evidence was, in part, inconsistent and therefore the complaint to the Magistrate appeared to rest on false allegations. There was no finding that the defence was true or that the complaint was altogether false or was malicious. The proceedings in the Criminal Courts, therefore, are evidence against the plaintiff rather than for him.

In the present suit, it is noticeable that the plaintiff has not cited and examined as his witnesses, the Mohamadans who were undoubtedly concerned with him in the affair, and could have given direct evidence to support him. It may, therefore, be presumed (section 114 (g) Evidence Act), that, if called, they would not have

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supported him. The plaintiff has examined Sivalal Duby who was his Mukhtar in the Criminal proceedings and Jagannathprasad, a relative of Sivalal, who depose that the defendant No. 1 virtually admitted the plaintiff's innocence to them.

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Their evidence is sufficiently discredited by the fact that the defendant No. 1, when complainant, was not cross-examined as to these alleged statements.

It is urged that the learned Munsiff wrongly rejected a certified copy of a receipt produced by plaintiff along with exhibit C, which is still on the records and which proves conclusively the settlement arived at by defendant No. 1 and her husband in a punchayet, a settlement studiously denied by her in her examination. The only comment to be made on this ground of appeal, is that the plaintiff should have caused the original to be called for and should have proved it. The plaintiff failed to do so and the certified copy, being of an unproved private document, could not be accepted in evidence.

The appeal is dismissed with costs.

## APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

RANGA, APPELLANT, (DEFENDANT No. 2)

*v.*

LAKSHMYA, AND ANOTHER, RESPONDENTS, (PLAINTIFF'S LEGAL REPRESENTATIVES).*

1904. September 23.

*Instalments—Decree for payment of a sum by instalments and in default a larger sum to become payable—Default in payment of instalments—Waiver by plaintiff of right to execute decree for the larger sum—Receipt by plaintiff of overdue instalments whether a waiver—Execution of decree.*

By a compromise decree, the defendants were directed to pay a certain sum of money by instalments and in case of default in the payment of any one instalment, a larger sum including the portion remitted should become payable

* Miscellaneous Second Appeal No. 4 of 1903-04, against the order of the District Judge of Shimoga in Miscellaneous Appeal No. 1 of 1901-02 reversing the order of the Munsiff of Shimoga in Execution Case No. 992 of 1900-01.

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by them to plaintiff. The first instalment fell due on the 15th October 1899 but the first payment was made on the next day and was Rs. 17-8-0 less, which deficiency was made good on the following day. The next instalment was due on 15th October 1900 but the payment was made on the 6th idem and was only Rs. 95 instead of Rs. 100. On the following day the defendants supplied to the plaintiff butter worth Rs. 4-8-0. The decree-holder applied on 11th March 1901 for the execution of the decree for the larger sum and after his death his sons repeated the application on 6th April 1901. The defendants contended that the plaintiff by accepting the first instalment though paid a few days after the due date and also the second instalment which was paid before the due date, had waived his right to execute the decree for the larger sum.

*Held*, that the defendants having failed to secure a receipt in proper form or an acknowledgment that the amounts were paid in satisfaction of the 1st instalment, it could not be said that the judgment-creditor accepted the payments on account of the first instalment and waived his right to execute his whole decree.

*Balaji Ganesh* v. *Sakharam*, *I. L. R.*, 17 *Bom.*, 555, *referred to.*

EXECUTION application. The Munsiff of Shimoga rejected the application. On appeal, the District Judge of Shimoga reversed the Munsiff's decision and allowed the plaintiff's application.

The 2nd defendant preferred this Miscellaneous Second Appeal.

Mr. *S. N. Ramaswami Iyengar* for the appellant.

Mr. *B. Ramanna* for the respondents.

ORDER.—The original decree provided for payment of a certain sum by instalments and in default of any one instalment, for payment at once of a larger sum. Exhibits I and II shew that the amount of first instalment was paid on two occasions some days after it fell due, and that Rs. 95-8-0 were paid on 6th October 1900, a few days before it fell due. The deceased decree-holder applied on 11th March 1901 and again on 6th April 1901 for execution for the larger amount, on the ground that the defendants had made default in payment according to instalments. The defendants contend that he had accepted the first instalment though paid a few days after date and that the second instalment had been paid before due date by delivery of Rs. 95-8-0 in cash and of butter for 4-8-0. The receipt exhibit I passed by the judgment-creditor does not admit

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that the two sums were paid on account of the first instalment. It merely states that the sums were paid towards the decree amount. Though the sum of the two payments is just equal to the amount of the first instalment, the defendants having failed to secure a receipt in proper form or an acknowledgment that it was paid in satisfaction of the first instalment, we are unable to hold that the judgment-creditor accepted the payments on account of the first instalment and waived his right to execute the whole decree—*see Balaji Ganesh* v. *Sakharam,* 17 B. 555. As regards the payment of Rs. 95-8-0 also, exhibit II merely acknowledges receipt of the money on account of the decree and not towards the 2nd instalment. The judgment-creditor did not give credit to defendants for Rs. 4-8-0 and the plea of payment cannot be accepted under section 258. So as regards the 2nd instalment also it cannot be held that it was duly paid.

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Under these circumstances, the decision of the learned District Judge must be accepted as correct and this appeal dismissed with costs.

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## APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice A. E. Staley, Chief Judge,*
*Mr. Justice A. Rangaswami Iyengar, and*
*Mr. Justice H. V. Nanjundayya.*

MIRLE N. SUBBA RAO AND 4 OTHERS, APPELLANTS, (PLAINTIFFS)

*v.*

PARVATAMMA, RESPONDENT, (DEFENDANT).*

1904. July 21. September 21.

*Cancellation of a partition deed and recovery of property, suit for—Jurisdiction—Subject matter of suit—Valuation thereof for determining jurisdiction—Madras Civil Courts' Act, section* 12—*Mysore Civil Courts Regulation I of* 1883, *section* 9.

The plaintiffs brought a suit in the Subordinate Judge's Court of Mysore for the cancellation of a partition deed and recovery of property worth Rs. 3,000 which was in the possession of the defendant. It was contended by the latter that the suit was beyond the jurisdiction of the Subordinate Judge as the property involved in the partition deed was worth more than Rs. 25,000.

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* Miscellaneous Appeal No. 70 of 1903-04, against the order of the Sub-Judge of Mysore, in Original Suit No. 17 of 1903-04.

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*Held*, (BY THE FULL BENCH) that the term subject matter of suit used in the Civil Courts Regulation was intended to mean only the property or portion of property actually sued for and not the whole property regarding which enquiry would necessarily have to be made in connection with the suit.

*Held also*, (Justice NANJUNDAYYA, dissenting), that as the plaintiffs in the present case wanted a declaration that the items of property in their possession as well as those sued for were the self-acquired property of their father, that they should be confirmed in possession of the former without being called upon to surrender any of them to the defendant and that they should be awarded the property in the possession of the defendant, the whole property minus Rs. 5,000 relinquished by the plaintiffs was the amount or value of the subject matter in suit and therefore the Sub-Judge had no jurisdiction to entertain the suit.

SUIT for cancellation of partition deed and recovery of property. The Sub-Judge passed an order directing the return of the plaint for presentation to the District Court, on the ground that the subject-matter in dispute was beyond his pecuniary jurisdiction.

Against this order the plaintiffs preferred this Miscellaneous Appeal.

Messrs. *D. Venkataramayya* & *M. Ramachandra Rao* for the appellants.

Messrs. *H. Narasinga Rao, B. Nanjundappa* & *S. Ranganna* for the respondent.

This Miscellaneous Appeal first came on for disposal before a Bench consisting of Mr. Justice A. E. Staley, Chief Judge and Mr. Justice H. V. Nanjundayya who delivered the following separate orders.

ORDER.—CHIEF JUDGE :—The plaintiffs in this case, sued that, by cancellation of a partition deed, the Court should decree to plaintiffs, movable and immovable properties which had been the self-acquired properties of Nanjanna (father of plaintiffs 1 to 4 and husband of plaintiff No. 5), fraudulently appropriated by the husband, Krishnappa, of defendant and described in the schedule attached to the plaint, for a decree against Krishnappa's property movable and immovable, for recovery of 3,000 Rs. out of 8,000 Rs. fraudulently recovered by Krishnappa and for costs, nterest and general relief.

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The Suits' Valuation Act VII of 1887 is not in force in Mysore. The valuation of a suit for determining jurisdiction under Regulation 1 of 1883, depends not on the valuation for the determination of Court fees, but under sections 9 and 10 on the amount or value of the subject matter except in the case of land, a house or a garden (S. 11) when the valuation to be made as provided by Section 4, clause 5, Regulation III of 1900.

In the present suit, the plaintiffs seek to have the partition deed invalidated, and to be placed in the same state as they would have been, had the partition deed not been executed in respect of any of the property with which it deals. The subject matter of the suit is therefore the whole deed and not any particular items dealt with by it, though it is only in respect of certain items that the plaintiffs allege they have been wronged. The valuation of the plaintiffs' interest in the whole deed, placing the suit beyond the jurisdiction of the learned Subordinate Judge, I think he rightly returned the plaint for presentation in the proper court.

The appeal is dismissed with costs. Advocate's fee Rs 32.

Mr. Justice H. V. NANJUNDAYYA:—The plaintiffs' suit is for the recovery of certain property valued at Rs. 3,320 from the defendant, which the defendant's husband obtained by fraudulently inducing the plaintiffs to enter into an arrangement as evidenced by a deed of partition. The cancellation of this arrangement of partition is also asked for as a preliminary to the return of the property. The question is, whether the subject matter of the suit is the value of the property only, or whether the subject matter of the deed of partition should also be included. The proper test seems to be whether the plaintiffs would suffer any damage if the latter prayer is omitted altogether. Presumably, this property is all that the plaintiffs have lost by the arrangement; and if the grant of this relief involves the declaration of the invalidity of the instrument, that would be merely an auxiliary matter. It is quite possible to frame the plaint in such a manner as to ask only for restitution of the property: and it would seem that the mere mention of cancelling the instrument, in the final portion of the plaint, should not make any difference. The Subordinate Judge seems to have been

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1904. wrong in returning the plaint; and I would direct that his order be reversed, and the plaint admitted and disposed of on its merits.

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[As there was a difference of opinion between their Honours, the case was again argued before the Full Bench constituted as above.]

ORDER.—Mr. Justice A. RANGASWAMI IYENGAR:—This is an appeal from the order of the Sub-Judge of Mysore in O. S. No. 17 of 1903-04, returning the plaint for presentation to the proper court on the ground that the value of the subject matter of the suit was in excess of his jurisdiction.

2. The plaint sets forth that the deceased father of the minor plaintiffs and the deceased husband of the defendant were divided brothers, that, after the former's death in 1896, the latter falsely represented that he and his deceased brother had re-united themselves and jointly acquired property and induced them by fraud and force to enter into a fresh partition of property as per registered deed, dated 30th November 1896, that, subsequently they discovered in August 1901, that the representations made by the defendant's husband, were false, and that he had no right to a share in their father's acquisitions, that they made a demand on him to have the deed cancelled which he promised to do but died on 29th November 1903, and that the plaintiffs prayed for the cancellation of the partition deed and for the recovery of landed properties, which the deceased husband of defendant obtained from the plaintiffs under that deed and for the recovery of Rs. 3,000 out of about Rs. 8,000 debts recovered by the defendant's husband.

Three items of property consisting of a house valued at 150 Rs. and 2 wet lands at Rs. 20 and 14 respectively, are described in the plaint schedule. The value of the property according to the Court Fees Act would thus amount to Rs. 3,320.

3. The argument of the Sub-Judge is contained in the following extract of his order.

"Now, by this suit, plaintiffs not only want to secure to themselves their share worth Rs. 11,241-13-5 which they got under the deed but also want to recover Rs. 3,000 in cash and a house worth Rs. 150 and 2 lands valued at Rs. 600 in the deed out of the share

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allotted to the defendant's husband. But they cannot get the fresh allocation as they want without getting the partition deed cancelled. The relief to cancel the partition deed appears therefore to be a principal relief and not a subordinate one.

The value of the subject matter of the suit must include, I think, the value of the interest of the plaintiffs in the document sought to be invalidated (I. L. R. XV Madras 296). Such value apparently is above Rs. 15,000 . . . ."

4. In appeal, it is contended for the appellants that the suit is for the recovery of certain items of property after cancelling a partition, that the latter is not the main prayer and that, if necessary, the plaintiffs might be permitted to strike out the prayer for the cancellation of the deed of partition as a separate relief.

5. The appellants' Advocate admitted that, if the suit had been instituted for a declaration that the deed of partition was executed through fraud, and therefore invalid, the value of the subject matter of the suit in the terms of section 9 of the Civil Court Regulation would be the whole property involved in such partition but that, since consequential relief is claimed, the subject matter should be regarded as the property which is actually sued for. In these circumstances, it is necessary to consider the meaning of the words "suits . . . . . of which the amount or value of the subject matter does not exceed Rs. 5,000" in section 9 of the Regulation No. 1 of 1883.

6. Before the Code of Civil Procedure Act VIII of 1859 was passed, the pecuniary jurisdiction of the Civil Courts of various grades in British India, were regulated by special Regulations, Acts or Orders. Accordingly, section 5 of the Civil Procedure Code, provided that "subject to such pecuniary or other limitations as are or shall be prescribed by any law for the time being in force, the Civil Courts of each grade shall try all suits declared cognizable by those courts . . . . . ." Section 6 provided that "every suit shall be instituted in the court of the lowest grade competent to try it." Section 7 laid down that "every suit shall include the whole of the claim arising out of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the juris-



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diction of any court." Section 26 required that the plaint shall contain . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

(3). The relief sought for, *the subject of the claim,* the cause of action etc.

(4). When the claim is for any property other than money, its estimated value.

(5). When the claim is for land or for any interest in land, the nature of the tenure or interest must be specified.

Section 30 provides :—

If the amount or estimated value of the claim, as stated by the plaintiff, be beyond the jurisdiction of the Court, the plaint shall be returned to the plaintiff in order to its being presented to the proper Court.

7. It may be gathered from the above provisions that the words 'claim' and 'subject of claim' are used in the same sense to indicate the property or amount of money sued for.

Except as regards one or two Provinces, it is difficult to trace the actual expressions used in the legal provisions defining the jurisdiction of the various Courts before the Civil Procedure Code was passed. But as far as they are available, it is desirable to collect and compare them with those in later Acts in order to understand the policy of the Legislature in regulating Jurisdiction.

8. Before Madras Civil Court Act, was passed in 1873, the Jurisdiction fixed by the Regulation VI of 1816, as modified by Regulation III of 1833 and by Act XIX of 1855, was expressed in these terms :—

"In suits for land exempt from payment of Government rent, the annual produce of which does not exceed Rs. 100; for land subject to payment of Government rent or other property where *the value of the matter in dispute* does not exceed Rs. . . . . ."

The Presidency Small Cause Courts Act IX of 1850 is one of the earliest. In section 25, it directs that "all suits where the debt or damage claimed or the value of the *property in dispute* is not

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more than 500 Rs. whether *on balance of account or otherwise* may be brought in the Court of Small Causes."

In Burmah Courts Act I of 1865, the words used are, "suits not exceeding Rs. . . . . *in value or amount.*"

In Punjab Act XIX of 1865, passed in the same year, the same words are used.

In Bombay Act XIV of 1869 (section 24) the words used are :—

"Suits and proceedings of a civil nature, wherein, the subject matter does not exceed in amount or value, Rs. . . . . ."

In the Bengal Civil Courts Act VI of 1871, section 20, the expression is "suits in which the amount or value of the subject matter *in dispute.*" But as this Act was passed after that of Bombay, and before that of Madras, it is not likely that any special significance was attached to the words in dispute, though the Allahabad High Court made some distinction on that score in I. L. R. XII Allahabad, page 507.

The expressions used in Madras Civil Courts Act III of 1873, section 12 and our Regulation, Section 9, are identical with those used in Bombay.

9. It will thus be seen that, till the Civil Courts Acts of 1869, 1871 and 1873, were passed, in the provisions for regulating jurisdiction in suits, various expressions were used for the relief sought or claimed in suit. But all proceeded upon the value of the property actually sued for, without reference to the total value of the account or property of which the amount or property sued for, might be only a part. In Madras, before the Civil Courts Act was passed, the words '*matter in dispute*' were used as synonymous with *land or other property* sued for. In the Acts passed before 1869, the phrase employed was '*the value or amount of suits.*' There is nothing to show either in the language of the Acts themselves or decisions contained in the Law Reports, that any change was intended to be made in this respect. I am therefore inclined to hold that the word subject matter of suit as used in the Civil Courts Act is intended to mean only the property or portion of property actually sued for, and not the whole property regarding which en-

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quiry would necessarily have to be made in connection with the suit. My meaning would be clear by a few concrete instances.

A sues to recover the amount of a bond, remitting half of it. In this case, though the Court may have to adjudicate upon the genuineness of the bond involving double the amount sued for, the amount sued for is the subject matter of the suit.

A sues to have a will declared genuine and to recover only a portion of property comprised in that will. Here also, though the genuineness of the will involving the whole property is in dispute, the subject matter of suit should be the property actually claimed.

10. There is thus, according to my view, no difference between the expression "subject matter" of suit in the Civil Courts Act and the words "relief sought" as used in the Court Fees Regulation, section 4, clause IV, as regards the corpus of the property, though there may be a difference in the mode adopted in fixing its money value. In support of this conclusion, I would refer to the fact that the last para of section 7, clause IV, of Act VII of 1870 contained the words "and the provisions of the Code of Civil Procedure, section 31, shall apply, as if, for the word 'claim' the words 'relief sought' were substituted," till amended by Act XII of 1891 showing that relief sought was used as synonymous with *claim*. It may be stated that the word *subject matter* is used in section 4, clause IV (*a*) as equivalent to 'property sued for,' and that, in schedule I, Article number I of the Court Fees Regulation, the words "amount or value of the subject matter in dispute' formerly used in the Court Fees Act VII of 1870, have been retained.

11. I am conscious that the opinion expressed above, runs counter to the views of certain eminent Judges. I shall refer to them and offer such explanation as is available in support of my opinion.

In *Vydianatha* v. *Subramanya*, I. L. R., 8 M. 235 (1884), Sir Charles Turner, C. J., held that, "in suits for partition that unless there was an agreement avoiding the necessity for a general partition among the several members, the share of any one member could hardly be ascertained, but whether this is so or not, the whole property is subjected to the court for partition and the . . . . ."

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This view was adopted in *Murahary Sastry* v. *Subbannah*, 14 Mys. L. R. 193 (1891), by Mr. Justice Ramachandra Iyer in the following words "The subject matter is the specific share claimed by a plaintiff and the value of that share determines the question of jurisdiction. A suit for partition instituted by a member of an undivided Hindu Family forms an exception to the general rule . . ." "If a court has no jurisdiction over the whole property, it cannot effect a partition as directed by the Hindu Law." (*See* also *Siddalinga Sastry* v. *Sidda Basaiah*, 9 Mys. L. R., 254). But the decision of Turner, C. J. was explained away in some later decisions and notably in *Khansa Bibi* v. *Syed Abba*, I. L. R., 11 M., 140 (1887), and *Ramayya* v. *Subbarayudu*, I. L. R. 13 Mad. 25 (1889), on the ground that the principle was applicable only to the case of partition among Hindus. But in *Hikmat Ali* v. *Wali-Un-nissa*, 12 All, 507, (1889), the Allahabad High Court held that the decision was not applicable in their province as the corresponding section 12 of Act III of 1873, contained the words subject matter *in dispute*. But these appear to be only attempts to explain away a decision the principle of which was not apparently acceptable to the judges. On the other hand, in *Lakhman Bhatkar* v. *Baaji Bhatkar*, 8 Bombay 31, (1883), Mr. Justice West has clearly explained that "the subject matter of a suit is generally the specific thing sought in it. In a suit for injuring a carriage, the subject matter would, in one sense, be the carriage but the object of the suit would be the amount demanded, and this is what subject matter seems to mean for the purposes of litigation under section 25 of Act XIV of 1869 . . . . . . Hence it is manifest that what is sought is the true measure of the subject matter, not what the suit is about in a wider and vague sense." "It has been contended that the subject matter of a partition suit by one who claims his share from the other coparceners is the whole joint estate. In a sense, this is so. The land and goods as a whole are the material substratum of the proprietary right, a part of which the plaintiff seeks to enforce. But in the sense of the Act, we think the subject matter is the jural relation between the parties as alleged by one and denied by the other, and that, in the case of a single aliquot part, is the ownership of such part. Materially, this is embraced in the aggregate estate, which is thus itself also the subject matter, but more remotely and not in a sense conformable to that in which subject

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matter must be understood in analogous cases." This case was one between Hindus for partition and possession of a separate share in joint family property.

The same principle was affirmed by *Garth, C. J.* in *Kirty Churn Mitter* v. *Aunath Nath Deb, I. L. R.,* 8 *Calcutta* 757 (1882). He held that, for purpose of jurisdiction in a suit for partition, the value of the property in suit (*viz.*, the share of the plaintiff) was the guide. *See* also *Augopura Chowdhry* v. *Meah Bibee,* Sutherland's Weekly Report, Vol. X p 207 (Civil Rulings) where it was held that, in a suit for a share of an undivided estate alienated under a Kobalah that the valuation of the suit for jurisdiction was on the value of the share.

12. On a careful consideration of the decisions referred to above, I am inclined to think that an assumption is made in the remarks of Turner, C. J. and Mr. Justice Ramachandra Iyer, that, in the suit for partition by an individual coparcener, an effective partition is made as regards the other coparceners and that final orders are passed as regards the claim for maintenance and other charges on the family estate. But this is not a fact. Though these have to be ascertained, in a measure, the court is competent to award only the share sued for in that suit. It would be different if all the persons interested, had come before the court for apportionment of their shares as in a suit for arbitration or for a decree on an award or in a suit for administration. And the Madras High Court have, in *Chakrapani Asari* v. *Narasinga Rau* and others, I. L. R., 19 Mad., 56, held that "when the suit relates to coparcenary property unless it is one for general partition among all the share-holders, the specific and definite share claimed must be held to be the subject matter of the suit as stated in the Suits Valuation Act, and the Act III of 1873 (Madras Civil Courts Act) and the value of the same should determine the court's jurisdiction and not that on the whole property." This was affirmed in *Velu Goundan* v. *Kumaravelu Goundan,* I. L R. 20 Mad., 289.

13. In this connection, reference must also be made to *Kencha Hanumiah* v. *Narayansawmi Mudaliar* and another, (Mis. Appeal 7 of 1893-94 on the file of the Chief Court), where it was held that though the amount claimed by plaintiff in a suit for account was

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less than Rs. 5,000, yet the suit was one for a dissolution and winding up of a firm and that one of the items to be dealt with involved a sum of Rs. 14,0(0 and therefore the suit should be tried by a District Court. It will be observed that the meaning attached to the word subject matter in this case is very wide indeed, comprehending almost all the items of credit and debit belonging to the business. It is very doubtful if this is in accordance with the scheme of the Regulation. But this was referred to and explained in another suit for accounts *Chicka Settappa* v. *Veerappa,* I Mysore C. C. R., 129. *See* also *Seetharamiah* v. *Reddi Buchanna,* IV M. C. C. R. 116.

13. I may also add that if the word subject matter of suit be intended to embrace more than the expression *claim* as used in the Code of Civil Procedure, the provision in that Code, empowering a plaintiff to remit a portion of his claim in order to bring his suit within the jurisdiction of a given court, would become nugatory. *See* section 7 of Act VIII of 1859 and sections 49 *(f)* and 43 of Act XIV of 1882.

14 Even the Suits Valuation Act did not make any change in the meaning of the expression, subject matter of suit, as employed in the Civil Courts Act, but only provided that the value of such subject matter might be calculated in a particular manner. In introducing the bill, the Honorable Mr. Ilbert explained that its main object is to provide means for determining the value of land for purposes of jurisdiction and Sir Andrew Scoble when moving that the bill be passed, observed that " It has been laid down by the High Courts in many decisions that the law may well establish, for purposes of revenue, certain fixed rules as to the valuation of suits; but such valuation obviously cannot be accepted as a criterion of a matter of fact such as *the actual amount* or *value of a claim* upon which the jurisdiction of the court depends." Thus this enactment did not attempt to make any change as to what is the *subject matter* of a suit in the Civil Courts Act, but only provided rules for determining its *value.* The absence of this Act in Mysore cannot affect the question on hand when we are prepared to calculate the value of immoveable property according to the provisions of section 11 of Regulation I of 1883.

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15. The question then for decision in this appeal is, granting that the word subject matter in section 9 of Regulation I of 1883 relates only to property actually in dispute, what is the subject matter of the plaintiff's suit. Whether it is confined to the three items of immoveable property and the sum of Rs. 3,000 which the plaintiffs want to recover, or comprises, in addition to these, the items of property which have been assigned to them under the deed of partition and which are admitted to be in their possession. Though the plaintiffs allege that the latter are the self-acquired property of their father, can it be said that there is no dispute about them and that the Court is not required to adjudicate upon and pass a decision about them? Since the contention between the parties is, whether the two deceased brothers did or did not jointly acquire all or any of the items, is it not open to the defendant to deny the plaintiffs' allegation that all are their father's self-acquired property and allege and prove that some or all of the items now in the possession of the plaintiffs were acquired by her husband and should be added to his estate if the plaintiffs should make out that the items in her possession should revert to them. In this view, it will not be correct to say that the plaintiffs are at issue only as regards the items which they sue for. Their real prayer is that they should be allowed to keep what was alloted to their share under the document, and should, in addition, recover the items sued for; or in other words, they want a declaration that the items in their possession as well as those sued for, are the self-acquired property of their father, that they should be confirmed in possession of the former without being called upon to surrender any of them to the defendant and that they should be awarded the property in the possession of the defendant.

All these reliefs are substantially prayed for whether we retain or expunge the prayer for the cancellation of the deed of partition as fraudulent. It is, therefore, very doubtful whether the plaint in this case is properly stamped and whether they should not pay additional stamp for the property which is in their possession also (*see* I. L. R. 15 M., 294). I am therefore of opinion that the whole property minus five thousand rupees relinquished by the plaintiffs is the amount or value of the subject matter in suit and *not only* those items which are not in their possession and which they wish to recover, that as

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the value of such property even when calculated according to section 11 of Regulation I of 1883 as regards the items of immoveable property would exceed Rs. 5,000, the Sub-Judge had no jurisdiction to entertain the suit, and that this appeal should be dismissed with costs.

THE CHIEF JUDGE:—I concur.

Mr. Justice H. V. NANJUNDAYYA:—I fully concur in the opinion of my learned colleague, arrived at, after an elaborate examination of authorities, that the subject matter of a suit is intended to mean only the property or portion of property actually sued for, and not the whole property regarding which inquiry would necessarily have to be made in connection with the suit. Applying this view to the facts of this case, though the Court has necessarily to decide on the validity of a deed of partition relating to property of a greater value, what the plaintiffs only seek to recover herein is below 5,000 Rs. in value. In fact, this case is exactly like the hypothetical case of a suit to recover property under a will, put by Mr. Justice Rangaswami Iyengar in para 10 of his Judgment.

The allegations of the plaint, as far as I can understand them, show that the plaintiffs got no property which was not previously in their exclusive possession. It seems to me immaterial whether or not they expressly ask for a declaration to set aside the deed of partition. The plaintiffs say that the defendant's husband mixed up certain items (Nos. 1, 4, 14, 15, 18 and 21) belonging to himself with others belonging to the plaintiffs, and misrepresented that all together formed joint property. In the partition thus brought about, he retained all his separate items to himself and, in addition, received the following items, which were the separate property of the plaintiffs, namely, 2, 3, 5, 13, 16, 17, 19 and 22. It is only restitution of this property that the plaintiffs seek. They ask for no relief in respect of the property already in their possession, as their case is that it is their own independently of anything in the partition deed. There is no question raised of confirming them in possession thereof; and it would become the subject matter of a suit only when they are called upon to surrender any part of it to the defendant, which the latter can do only by filing a separate suit.

For these reasons, I regret I have to dissent from the decision of my learned colleagues.



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## APPELLATE CIVIL.

*Before Mr. Justice A. Rangaswami Iyengar and Mr. Justice H. V. Nanjundayya.*

PADMARAJA PANDIT, APPELLANT, (DEFENDANT)

*v.*

SREEKANTIAH, RESPONDENT, (PLAINTIFF).*

*Stamp Act*, 1879—*Promise to pay money to a certain person—Construction of document—Promissory note—Bond—Agreement not otherwise provided for.*

The words of a certain document were as follows:—

"... in accordance with the promise already made to pay you a sum of Rs. 2,000 as a present, I shall pay to you. You may keep this with you as evidence."

The question for consideration was whether the document was a promissory note or a bond.

*Held*, that the document did not fall under the designation of a promissory note as generally understood.

*Held also*, that though the document would be a bond as generally understood, yet as it could not be brought under any of the three clauses defining a 'bond' in the Stamp Act, the District Judge was right in holding that it was an agreement not otherwise provided for.

SUIT to recover money from the assets of a deceased person. The plaintiff relied upon a letter which contained the words mentioned above. The Principal Munsiff of Mysore dismissed the suit on the ground that the letter was a non-negotiable promissory-note and not being stamped, was not receivable in evidence. In appeal, the District Judge holding the document to be an agreement not otherwise provided for, reversed the Munsiff's decision and remanded the case for disposal on merits.

The plaintiff preferred this Miscellaneous Appeal against the order of remand.

Messrs. *H. Krishna Rao* and *B. Nanjundappa* for the appellant.

Messrs. *J. C. S. Lawrance* and *S. Venkatachala Iyengar* for the respondent.

* Miscellaneous Appeal No. 49 of 1903-04, against the order of the District Judge of Mysore in Appeal No. 355 of 1902-03 remanding the suit in O. S. No. 323 of 1902-03 to the Principal Munsiff of Mysore for disposal on merits.

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ORDER.—The only question raised in this appeal is, whether the document relied on is a promissory-note as held by the Munsiff, or whether it is an agreement or a bond. The case is governed by the provisions of the Stamp Act of 1879, which contains no definition of a promissory-note. We agree with the learned District Judge in holding that the document does not fall under the designation of a promisory-note as generally understood. The words are " . . . in accordance with the promise already made to pay you a sum of Rs 2,000 as a present, I shall pay to you. You may keep this with you as evidence." It would be a bond as generally understood, but the Act having given a specific definition of what a bond means, we are bound to follow it. This document cannot be brought under any of the three clauses defining a bond.

For these reasons, we consider that the Judge was right in holding that this is an agreement, 'not otherwise provided for.'

The appeal being restricted to this single question, we consider that we cannot take any other point into account. The appeal is therefore dismissed with costs. Advocate's fee Rs fifteen.

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## APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

1904. August 6.

MUNISAMI AND ANOTHER, MINORS BY THEIR GUARDIAN AND FATHER BYRAPPA, APPELLANTS, (PETITIONERS)

*v.*

NANJEE AND ANOTHER, RESPONDENTS, (COUNTER-PETITIONERS).*

*Small cause suit—Death of defendant—Application to be brought on record as representatives—Order refusing permission—Appeal—Civil Procedure Code, sections* 368, 588—*Civil Procedure Code Amendment Regulation VII of* 1892.

The defendant in a small cause suit having died, some persons alleging themselves to be her daughter's sons applied to the court for permission to be brought on record as the deceased woman's legal representatives; but the

* Miscellaneous Appeal No. 78 of 1903-04, against the order of the Munsiff of Chikballapur in Miscellaneous Case No. 354/Small Cause Case No. 169 of 1903-04.

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1904. application was rejected on the ground that they were not the daughter's sons of the deceased defendant. The petitioners having perferred an appeal against the order, it was

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*Held*, that no appeal could be admitted against the order of the Munsiff on the Small Cause side.

APPLICATON under section 368 of the Code of Civil Procedure. The Munsiff passed an order disallowing the application.

The petitioners preferred this Miscellaneous Appeal.

Mr. *B. V. Ramasuami Chetty* for the appellants.

Mr. *S. Ranganna* for the respondent No. 1.

ORDER.—One Nanjee sued in S. C. No. 169 of 1903-04 on the file of the Munsiff of Chick Ballapur for the recovery of half of the produce of certain land, on the ground that she and one Sahadevamma were entitled to share it equally. Pending the trial of the suit, Sahadevamma died. An application was made on behalf of Mnnisami and Masi Anka, minors, for bringing them on record as the heirs of the deceased, on the plea that they were her daughter's sons. The Munsiff held an enquiry and found that they were not the sons of her daughter, but of the daughter of her sister and dismissed the application. This Mis. Appeal has been preferred against this order.

The first point for consideration is, whether an appeal lies against the Munsiff's order on the Small Cause side. Schedule II appended to Regulation No. VII of 1892 shows what chapters and sections of the Code of Civil Procedure have been extended to Courts of Small Causes. The provisions, relating to regular appeals and appeals against orders, are not included in them. It is clear, therefore, that no appeal can be admitted against the order under reference.

The appellant's Advocate admitted that no good grounds existed for treating this appeal as an application for revision under section 622 of the Civil Procedure Code.

This appeal is accordingly dismissed with costs. Advocate's fee Rs. 5.

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# APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice H. V. Nanjundayya.*

RANGASHESHA SHASTRY AND ANOTHER, MINORS BY GUARDIAN AND MOTHER VENKATA LAKSHAMMA, APPELLANTS, (PLAINTIFFS)

1904. August 9.

*v.*

RAMASWAMAIYA, RESPONDENT, (DEFENDANT).*

*Indian Limitation Act*, 1877, *Schedule II, Art.* 179 (4)—*Step in aid of execution—Certificate of Court transferring decree to another Court for execution—Civil Procedure Code, Sections* 223, 224.

On an application presented under section 223, Civil Procedure Code, for the transfer of a decree to another Court for execution, the Court passed an order transferring the decree on 25th October 1900. But the certificate which accompanied the order was dated 3rd January 1901. The present application for execution was presented on 17th December 1903. It was disallowed by the Lower Court as being time-barred. In appeal, it was contended that the fact of the certificate being dated 3rd January 1901 constituted a step in aid of execution and that the application was within time.

*Held,* that after the appellant's application under section 223, Civil Procedure Code, was presented, it was the duty of the Court to proceed under section 224 of its own motion and that as there was nothing from which a step in aid of execution could be inferred to have been taken by the appellant, further execution was barred by the provisions of Art. 179 (4) of Schedule II, Limitation Act, 1877.

*Koormayya* v. *Krishnamma Naidu, I. L. R.,* 17 *Mad.,* 165, *distinguished.*

EXECUTION APPLICATION. The Munsiff of Tumkur disallowed it.

The decree-holder preferred this Miscellaneous Appeal.

Messrs. *B. Nanjundappa* and *S. Ranganna* for the appellants.

Mr. *H. Krishnappa* for the respondent.

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* Miscellaneous Appeal No. 77 of 1903-04, against the order of the Munsiff of Tumkur in Execution Case No. 618 of 1903-04.

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RANGASHESHA SHASTRY v. RAMASWAMAIYA.

ORDER.—The appellants, decree holders, applied on the 17th October 1900 for transfer of their decree in O. S. No. 300 of 1899-1900 from the Court of the Principal Munsiff of Bangalore to the Court of the Munsiff of Tumkur for execution. The application was under section 223, Civil Procedure Code. Thereupon, as required by the provisions of section 224, Civil Procedure Code, the Court sent the decree with the requisite copies and certificate according to the application referred to, passing its orders on the 25th October 1900. The certificate which accompanied the decree, was dated 3rd January 1901. No fresh application for execution was made in pursuance of the application for transfer till the 17th December 1903. The only point urged in this appeal is, that it should be inferred from the fact of the certificate being dated the 3rd January 1901, that it was issued on an application of the decree-holders on that date, constituting a step in aid of execution as in the case I. L. R., 17 Mad., p. 165. In that case, it was held by inference from the Sheristadar's report and the Court's order that there was a request for payment of money realized, constituting a step in aid of execution, sufficient to keep the decree alive. In the present case, however, there is nothing from which such an application can be inferred since it was the duty of the court to proceed under section 224, of its own motion, without further application, after the appellant's application under section 223. (Cal., L. R. X p. 330). We think, therefore, that further execution is barred by the provisions of Article 179 (4), Schedule II, Limitation Act 1877.

The appeal is dismissed with costs.

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## APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice H. V. Nanjundayya.*

SRINGERI MUTT BY ITS AGENT YEGNESWARA SASTRY, APPELLANT, (PLAINTIFF)

1904. September 21.

*v.*

VENCATANARANAPPA, RESPONDENT, (DEFENDANT).*

*Decree passed without a succession certificate—Joint trial of two cases—Consent of both parties obtained in original Court—Effect—Legality of procedure objected to in appeal—Right of parties—Appeal—Procedure.*

In an appeal, the Sub-Judge of Mysore remanded the case to the Lower Court for recording fresh evidence on the ground that there were some irregularties in it. Against this order of remand the plaintiff preferred an appeal to the Chief Court and contended that as the defendant had not objected to those irregularties in the Court of First Instance, he was precluded from doing so in the Appellate Court.

*Held*, that a judgment-debtor was not restrained from questioning in an Appellate Court the legality of the proceedings against him by his consent in the Original Court if he gave such consent.

*Held also*, that this consent could not make legal proceedings which were not legal.

ORDER of remand by the Sub-Judge of Mysore under section 562, Civil Procedure Code.

The plaintiff preferred this Miscellaneous Appeal against the order of remand.

Messrs. *B. Nanjundappa* and *S. Ranganna* for the appellant.

Mr. *J. C. S. Lawrance* for the respondent.

ORDER:—This is an appeal against the order of the Subordinate Judge of Mysore in Appeal No. 200 of 1903-04. The order was that the decree in favour of the plaintiff in O. S. No. 814 of 1901-02 in the Court of the Munsiff of Nanjangud should be set aside on the

* Miscellaneous Appeal No. 6 of 1904-05, against the order of the Sub-Judge of Mysore in Appeal No. 200 of 1903-04 remanding Original Suit No. 814 of 1901-02 on the file of the Munsiff of Nanjangud for disposal on merits.

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ground that plaintiff could not obtain a decree in the suit without obtaining a succession certificate under section 4, Regulation VII of 1901; and that there must be a proper trial of the suit on such certificate being furnished, the evidence already recorded being in a joint trial of Suit No. 814 with Suit No. 815, the two suits being against different parties on different causes of action.

It is urged here that the defendant, having taken no objection to the absence of a certificate of heirship and to the joint trial in the original court, was not entitled to raise objections in the Appellate Court on these points. We find, however, that the defendant generally puts the plaintiff to proof of his title: and it was necessary for the plaintiff to produce a certificate of heirship in order to prove his title. A judgment-debtor is not restrained from questioning in an Appellate Court the legality of the proceedings against him by his consent in the original court if he gave such consent. His consent cannot make legal proceedings which are not legal. In argument the rulings I. L. R. 28 Calcutta, p. 246 and I. L. R. 16 Madras, p. 454 have been referred to., But in the former the plaintiff required no certificate of heirship because the right to sue first accrued to him. In the second the plaintiff's right to sue, not to get a decree, without such certificate was in question.

It has been held that, in analogous cases, where the parties apply to have them tried together, and that the evidence in one case shall be made use of in the trial of the others, the Judge should try all the cases together. (15 W. R. pp. 10 and 395). In the present cases, suit No. 814 was tried with suit No. 815 by consent of parties. The evidence for the plaintiff was practically of the same witnesses but the evidence and circumstances and defences were different: and the issues different. I think that the learned Munsiff therefore should not have tried the suits as one, or in one trial and made one record. The learned Subordinate Judge has directed that fresh evidence should be recorded in suit No. 814 but has not passed such order for a fresh trial of suit No. 815.

Although we think that the proceedings were irregular in holding the trial of the two suits together, we are unable to find that the irregularity affected the merits of the cases or the jurisdiction of the court. The learned Subordinate Judge has not pointed out how the

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merits of the cases have been affected and there is nothing in the Civil Procedure Code, prohibiting expressly the record of evidence in the way in which it has been done. In this court it has not been pointed out how the defendant was injured by the manner in which evidence was recorded or how he will be benefited by a fresh record. Apparently both parties will be uselessly put to expense.

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We think, in view of the provisions of section 578, Civil Procedure Code, that the order of the Subordinate Judge, directing a fresh record of evidence in suit No. 814, should be set aside, the Miscellaneous Appeal otherwise dismissed; but all costs to follow the result of the decision in the original suit.

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## APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice H. V. Nanjundayya.*

SETTY MARIAPPA, APPELLANT, (COUNTER-PETITIONER)

1904. September 29.

*v.*

LINGANNA, RESPONDENT, (PETITIONER).*

*Mortgage—Second mortgage of the same property to the same person—Sale in execution of decree on second mortgage—Purchase by mortgagee decree-holder—Effect on decree on first mortgage.*

A decree-holder holding two decrees on separate bonds mortgaging the same property, in execution of the second decree purchased the property himself free from encumbrances. When he applied for the execution of the first decree, the judgment-debtor contended that the amount due under the first decree had become merged in the purchase made by the decree-holder in execution of the second decree.

*Held*, that as the mortgagee in the present case purchased under one mortgage decree, without notification of the second encumbrance under another mortgage decree, with permission of the Court, and presumably for the unencumbered value of the property, the mortgagor had no equity against him and the mortgagee could enforce the first decree for the balance due upon it against the mortgagor.

* Miscellaneous Appeal No. 13 of 1904-05 against the order of the Principal Munsiff of Bangalore in Miscellaneous case No. 993 of 1902-03.



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SETTY MARIAPPA v. LINGANNA.

*Baburavji* v. *Ramji Svarupji, I. L. R.,* 11 *B.,* 112; ***Ballam Das*** v. *Amar Raj, I. L. R.,* 12 *All.,* 537, *distinguished.*

*Sesha Ayyar* v. *Krishna Ayyangar, I. L. R,* 24 ***Mad.,*** 96, *followed.*

MISCELLANEOUS APPLICATION by a judgment-debtor. The Principal Munsiff of Bangalore allowed it and dismissed the execution application presented by the decree-holder.

The Counter-Petitioner (decree-holder) preferred this Miscellaneous Appeal.

Mr. *N. Cheluva Iyengar* for the appellant.

Mr. *N. V. Narasimha Iyengar* for the respondent.

ORDER.—The circumstances of this case, so far as it is necessary to notice them for the purposes of this appeal, are these. The counter-petitioner, now appellant, obtained against the petitioner, now respondent, a decree in suit No. 192 of 1896-97 upon a registered mortgage bond. The decree has been in part satisfied but part remains due. The decree was for sale of the mortgaged property and for further execution against the judgment-debtor personally. In suit No. 193 of 1896-97 he obtained another decree upon another but unregistered mortgage bond, for sale of the same mortgaged property. The appellant brought the property to sale in execution of the decree in suit No. 193 and in execution purchased it as free from encumbrances in full satisfaction of the decree in suit No. 193. The question is, whether he can execute the decree against the respondent for the balance of the decree in suit No. 192. The learned Munsiff has held that the decretal debt in suit No. 192 has been merged in the purchase made by appellant in execution of the decree in suit No. 193. As authorities he has relied on the rulings, I. L. R., 11 Bom., p. 112 and I. L. R., 12 All., 537 as exactly in point. Against this decision the decree-holder has appealed. The ruling *Ballam Das* v. *Amar Raj,* I. L. R., 12 All., p. 537, followed the principle of the ruling *Baburavji* v. *Ramji Svarupji,* I. L. R., 11 Bom., p. 112. In both these cases the equity was the same that a purchaser of the equity of redemption in execution of a decree upon

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one mortgage who purchased *subject* to another mortgage could, after the purchase, not enforce that other mortgage for he purchased subject to it. The principle is sufficiently obvious. It is explained in the ruling, I. L. R., 18 All., p. 31, especially p. 34 *Muhammad Husen Ali Khan* v. *Thakur Dharam Singh.* Where the previous incumbrance is notified, the property sold must be taken to be bought at a price in which the amount of the notified incumbrance must be taken into account (*See Nand Kishore* v. *Raja Hariraj Singh,* I. L. R., 20, All., at p. 29); and the purchaser should therefore not gain a value for which he had not paid by recovering the amount of the incumbrance. In the present case, the mortgagee purchased under one mortgage decree, without notification of the second incumbrance under another mortgage decree, with permission of the Court, and presumably for the unincumbered value of the property. Since in the present case the decree-holder took no advantage of his position and paid the full value of the unincumbered property, the mortgagor has no equity against him. (I. L. R., 24 Mad., 96 and cases cited therein). And consequently as decree-holder in suit No. 192 the appellant can enforce that decree for the balance due upon it as against the respondent.

The appeal is decreed with costs.

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# REVISIONAL CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice H. V. Nanjundayya.*

1904. July 5.

HANUMANTHA BHATTA, PETITIONER

*v.*

SOWCAR KRISHNAPPA AND ANOTHER, COUNTER-PETITIONERS.*

*Civil Procedure Code, sections 276, 295—Attachment of property by one decree-holder—Claim under section 295 by another decree-holder—Sale of property to attaching creditor pending claim—Validity of sale—Right of claimant to attach same property in execution after sale.*

In execution of a decree, some property belonging to the judgment-debtor was attached and ordered to be sold on 19th December 1902. Before the date fixed for sale, another decree-holder applied for rateable distribution. The attaching creditor purchased the attached property on 29th November 1902 by private sale from the judgment-debtor and reported satisfaction of decree to the court and the same was accordingly recorded as certified. The 2nd decree-holder applied on 12th December 1902 for attachment of the same property in execution of his decree and attachment was made on 5th January 1903. The purchaser (1st decree-holder) put in a claim which was disallowed by the lower Court. In Revision, it was contended on his behalf that the sale to him was valid and that the judgment-debtor had no interest left in the property on 5th January 1903 which the court could attach in execution of the second decree.

*Held*,—that the sale to the petitioner (claimant) was a valid sale and that the counter-petitioner was not entitled to attach the property after such sale.

*Ganga Din* v. *Khushali, I. L. R.*, 7 *All.*, 702; *Durga Churn Rai Chowdhry* v. *Monmohini Dasi, I. L. R.*, 15 *Cal.*, 771; *Manohar Das* v. *Ram Autar Pande, I. L. R.* 25 *All*, 431; *Sorabji Edulji Warden* v. *Govind Ramji*, 16 *Bom.*, 91 *referred to.*

CLAIM under section 278 of the Civil Procedure Code. This was disallowed by the lower Court on the ground that the sale set up by the claimant was void under section 276, Civil Procedure Code.

The claimant (petitioner) preferred this Civil Revision Petition.

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* Civil Revision Petition No. 129 of 1903-04, against the order of the Subordinate Judge, Chitaldrug, in Miscellaneous No. 821/Execution No. 452 of 1902-1903.

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Messrs. B. *Nanjundappa* and *S. Ranganna* for the petitioner.

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Mr. *H. Krishnappa* for the counter-petitioner No. 1.

ORDER.—The circumstances of this case are as follows :—The petitioner Hanumantha Bhatta attached the property in suit in execution of his decree. The 19th December 1902 was fixed for sale. Another decree-holder, the counter-petitioner Sowcar Krishnappa, applied, before the date fixed for sale, for rateable distribution. It does not appear that the petitioner, was informed of this application. The petitioner, on the 29th November 1902, purchased by private sale from the debtor and reported satisfaction under the provisions of section 258, Civil Procedure Code, to the Court. The Court accordingly recorded satisfaction as certified on the 5th December 1902. No notice was apparently given to the counter-petitioner Sowcar Krishnappa; apparently because no notice was by law required. But that counter-petitioner on the 12th December applied for attachment, in execution of his decree of that property. The attachment was made on the 5th January 1903. The question raised here is, whether on the 5th January 1903 the judgment-debtor had any interest left which the court could attach in execution of the counter-petitioner's decree. The Lower Court has decided that the private sale was, under section 276, Civil Procedure Code, void as against the counter-petitioner sowcar Krishnappa. The present petition is by the purchasing decree-holder Hanumantha Bhatta for revision of that order.

It is urged here for the petitioner that the provisions of section 276 do not apply, because under them the private sale is void only as against claims enforceable under the attachment of the petitioner under his decree. The question is therefore whether the counter-petitioner Sowcar Krishnappa's claim was enforceable under the petitioner's attachment on the ground that that counter-petitioner applied for rateable distribution before the petitioner obtained the property by private sale after attachment of the petitioner.

It is argued for the petitioner that by the sale to him the Court realized no assets for distribution and consequently the counter-petitioner Sowcar Krishnappa cannot say that there was anything available for distribution against which his claim could be enforced.

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The following authorities on the subject have been referred to and are in point.

(1). I. L. R., Allahabad, Volume VII, p. 702. In that case, it was held that, when there was no attachment perfected under section 274, Civil Procedure Code, on the application of the second judgment-creditor, a mere application for rateable distribution could not be held to give a title to the protection afforded by section 276 against private alienation of property. It was held there that it is an essential condition, precedent to the exercise of the right under section 295, Civil Procedure Code, to rateable distribution, that there should be a sale in execution resulting in assets realized by the sale.

(2). I. L. R, 15 Calcutta p. 771. The Calcutta High Court in this ruling approved the ruling last referred to.

(3). A further ruling on the same point is to be found at p. 431 I. L. R., Allahabad, Volume XXV, a very recent ruling.

(4). In the ruling last quoted, the case I. L. R., 16, Bombay, p. 91 was noticed and dissented from. As a matter of fact, however, in this Bombay case, the ruling at p. 702 I. L. R., 7, Allahabad was not dissented from (*vide* p. 106). It was assented to, but was distinguished. In the Bombay case the assets after a private sale had come into the hands of the court, and were therefore available for rateable distribution.

Under section 295, Civil Procedure Code, there can be rateable idstribution even after realization of the assets. In the present case, there were no assets left to be realized in respect of this particular sproperty on the date fixed for sale in execution. Moreover, the petitioner's decree itself was satisfied before the date fixed for sale by the court.

On the other side, it is urged that the conduct of the petitioner in obtaining the property by private purchase was fraudulent. The fraud alleged is that the vendor was guardian of the minor defend-

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ant judgment-debtor, and that he sold the property to the petitioner, after the application for rateable distribution, without the permission or sanction of the court. It is, however, obvious that there is no procedure provided under which such sanction was necessary or could be obtained, and in any case the petitioner's rights could not be affected.

It is further urged that the counter-petitioner Sowcar Krishnappa can enforce his attachment even after the private sale because the sale is fraudulent and void under section 276, Civil Procedure Code.

We do not, however, consider that the sale has been shown to be fraudulent and void. The attachment was not, as a matter of fact, made till the 5th January 1903, after the private sale to the petitioner. It is true that the order on counter-petitioner's application to attach was passed on the 24th November 1902, before the private sale. It is not contended that the order to attach was equivalent to actual attachment. But it is urged that the circumstance of the private sale, taking place after this order to attach, shows the conduct of the petitioner was fraudulent. There is nothing to show that the petitioner had notice of this order and no reason to find his conduct was fraudulent.

In our opinion the sale to the petitioner was a valid sale and the counter-petitioner Sowcar Krishnappa was not entitled to attach the property after such sale. Accordingly the order of the original court is reversed and the petition allowed with all costs against that counter-petitioner. Pleaders fee Rs. 10.

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# REVISIONAL CIVIL.

*Before Mr. Justice A. Rangaswami Iyengar, and Mr. Justice H. V. Nanjundayya.*

D. G. CLAY, PETITIONER, (PLAINTIFF)

*v.*

1904. September 17.

BANGALORE CITY MUNICIPALITY, COUNTER-PETITIONER, (DEFENDANT).*

*Bangalore Town Municipal Regulation,* 1871, *section* 101—*Municipality—Negligence—Liability—Suit for damages.*

A suit brought against the Municipality of Bangalore for recovery of damages for injuries caused to the plaintiff's horse by a fall due to the negligence on the part of the Municipality, was dismissed on the ground that the latter was under no legal duty to repair defects in roads such as those brought to the notice of the court in the course of the enquiry. On Revision,

*Held*, that the duty to keep the roads free from pits or holes and the culverts safe so as to prevent accidents to the public devolved upon the Municipal Commissioners as the custodians of the roads and their liability was similar to that of an occupier of land with regard to persons coming on his land.

*Held also*, that the proviso "So far as the funds at their disposal will admit" contained in section 101 of the Bangalore Town Municipal Regulation, 1871, could not exempt the Municipality from all liability to maintain or repair the roads at least when they are dangerous to traffic.

SUIT for damages against the Bangalore City Municipality. The Sub-Judge of Bangalore dismissed the plaintiff's suit.

The plaintiff preferred this Civil Revision Petition.

As regards the maintenance and repair of streets, section 101 of Bangalore Town Municipal Regulation, 1871, provides as follows:—

"The Commissioners shall so far as the funds at their disposal will admit, from time to time cause the public streets to be maintained and repaired, and from time to time, may cause the same to be paved, metalled, flagged, channelled, sewered, or otherwise improved, and the surface thereof to be raised, lowered or altered as they may think fit; . . . . . . . . . . . . . ."

* Civil Revision Petition No. 137 of 1903-04, against the decision of the Sub-Judge of Bangalore in Small Cause Suit No. 519 of 1903-04.

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1904.

CLAY v. BANGALORE CITY MUNICIPALITY.

Mr. *J. P. Saldanha* for Mr. *A. M. Corner* for the petitioner.

Mr. *B. W. Lawrance* for Mr. *J. C. S. Lawrance* for the counter-petitioner.

ORDER.—The Sub-Judge has found that the accident to the plaintiff's carriage occurred because the road material had fallen through an opening between the covering stones of a culvert leaving a hollow space under a thin film of the surface of the road and the foot of the horse sank through this film. The question of law for our consideration is, whether the Municipal Board can be held to have been guilty of negligence. Under section 101, the liability of the Commissioners is "to cause the public streets to be maintained and repaired so far as funds will admit." As regards the duty of repairing and metalling the roads generally, there may be a discretion on the part of the Commissioners to undertake them or not according to the funds at their disposal—and they may not be liable for the roads being rough and badly kept. But it is impossible to contend that it is not their duty to keep the roads free from pits or holes and the culverts safe so as to prevent accidents to the public. The duty devolves upon them as the custodians of the roads and their liability is similar to that of the occupier of land to take by himself and his servants reasonable care that a person coming on the land with his license shall not be exposed to unusual danger, of which the occupier knows or ought to know (Addison, 6th Edition, p. 313). The general rule is, that "in the absence of something to shew a contrary intention, the Legislature intends that the body, the creature of the statute, shall have the same duties * * as the general law would impose on a private person doing the same things." p. 726. In the case of the defendant, Municipality, the Regulation casts on the Commissioners, the duty of keeping the public streets to be maintained and repaired, etc, "so far as the funds at their disposal will admit." But this last proviso cannot exempt them from all liability to maintain or repair the roads at least as regards even when they are dangerous to traffic. So the defendant cannot escape responsibility if it can be proved that the unsafe condition of the culvert was known to them or could have been ascertained with ordinary or reasonable care. But the evidence on this point clearly shows that the hole was not visible and



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that a thin film of the surface of the road hid it from view. It is also in evidence that, before this accident occurred, heavy rains had fallen scouring the roads.

Thus no negligence has been made out and the Sub-Judge was right in dismissing the plaintiff's suit.

This application for revision must be dismissed with costs. Advocate's fees Rs. 15.

## REVISIONAL CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge.*

1904. September 27.

NARANAIYA, PETITIONER, (DEFENDANT)

*v.*

SABHAPATHI MODLIAR, COUNTER-PETITIONER, (PLAINTIFF)*

*Stamp Regulation* II *of* 1900, *sections* 2 (22), 36, *Schedule* 1, *Articles* 47, 12(*b*), 60—*Promise to pay money on demand on a certain day—Promissory note—Agreement—Evidence—Admissibility.*

The plaintiff sued for the recovery of Rs. 55 due on a document bearing a stamp of one anna only and containing a promise by the defendant to pay the sum on demand on the 48th day after its execution and obtained a decree. In Revision, it was contended that the document was inadmissible in evidence as it was not properly stamped as required by law.

*Held*, that the document in question was a promissory-note under section 2 (22), Stamp Regulation II of 1900 and that the proper stamp under Articles 47 and 12(b) Schedule 1 of that Regulation was two annas.

*Held also*, that since the document had been admitted in evidence, the admission could not be called into question.

SUIT for money due on a document. The Sub-Judge of Bangalore, holding the suit document to be an agreement for stamp purposes and after levying the necessary duty and penalty thereon, passed a decree in favour of plaintiff.

The defendant preferred this Civil Revision Petition.

* Civil Revision Petition No. 21 of 1904-05, against the decision of the Sub-Judge of Bangalore in Small Cause Suit No. 893 of 1903-1904.

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1904.

NARNAIYA *v.* SABHAPATHI MODLIAR.

Messrs. *D. Venkataramayya* and *M. Ramachandra Rao* for the petitioner.

*Mr. C. Krishna Murti* for the counter-petitioner.

ORDER.—Against the decree of the Small Cause Court, it is urged that the document on which plaintiff sued, was neither a bond nor a promissory-note and it was inadmissible in evidence as not duly stamped. The Small Cause Court held it to be an agreement for stamp purposes.

The document is a promise by the defendant to pay on demand, on the 48th day after execution, the sum of Rs. 55. It is, therefore, evidently a promissory-note under section 2 (22), Stamp Regulation II of 1900; and the proper stamp under Articles 47 and 12(*b*) Schedule I of that regulation is two annas. It bears a stamp of one anna only. The order of endorsement to plaintiff requires no transfer stamp (Article 60a, Exemptions). It cannot be treated as an agreement. Eight annas would be the proper stamps for an agreement under Article 5 (*b*) of that Schedule. Since, however, the document has been admitted in evidence, the admission cannot be called into question (s. 36, Stamps Regulation 1900). The deficiency being insignificant and the Small Cause Court having admitted the document as properly stamped, I do not think it necessary to impound the document under section 61 of the Regulation, of my own motion.

It has been urged that the document was without consideration. I am unable to find anything in the proceedings to support the contention and the Court has, on the facts, found against the petitioner.

The petition is dismissed with costs. Advocates fee Rs. 16.

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## MISCELLANEOUS CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

1904. July 7.

SHAMANNA, PETITIONER, (DEFENDANT)

*v.*

SHAMANNA, COUNTER-PETITIONER, (PLAINTIFF).*

*Civil Procedure Code, section 23—Transfer application—Notice to the other side not given—Procedure.*

The defendant in a certain suit applied for a transfer of the case to another court but without giving the plaintiff notice of his intention to do so as required by section 23 of the Code of Civil Procedure.

*Held*, that the original Court had no jurisdiction to entertain the application for transfer until the defendant gave notice in writing to the plaintiff of his intention to apply for transfer and therefore the application must accordingly be dismissed on that gound.

SUIT for money. The defendant's application praying for the transfer of the suit from the Court of the Munsiff of Shimoga to that of the Munsiff of Bangalore and the plaintiff's objections thereto were submitted by the Munsiff through the District Judge of Shimoga to the Chief Court under section 23 of the Civil Procedure Code.

Mr. *J. C. S. Lawrance* for the petitioner.

Mr. *M. Bheema Rao* for the counter-petitioner.

ORDER.—In this case the defendant in a suit for recovery of money in the Court of the Munsiff of Shimoga applied for transfer of the hearing to a Court in Bangalore on the ground of convenience. The application was made to the Munsiff of Shimoga, who thereupon stayed proceedings in the suit; and gave the defendant time to move this Court for a transfer. The defendant did not come for a transfer. The plaintiff afterwards put in a petition before the said Munsiff (though plaintiff had received no formal notice of the application) and asked that the suit should proceed. Thereupon

* Civil Petition No. 206 of 1903-04, praying for the transfer of Original Suit No. 156 of 1900-01, from the file of the Court of the Munsiff of Shimoga to that of the Munsiff of Bangalore.

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summons was served on the defendant and the suit proceeded. The defendant did not, however, appear and the suit was decreed exparte against the defendant. On notice of execution the defendant applied to the Court to set aside the exparte decree, alleging that the provision of section 23, Civil Procedure Code, had not been carried out as the Court had not forwarded the application for transfer to the District Court. Thereupon the District Court, agreeing with this view, set aside the exparte decree, and the Munsiff at his direction has submitted the proceedings under section 23, Civil Procedure Code, to the District Judge of Shimoga. The latter has forwarded the proceedings to this Court for disposal.

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SHAMANNA v. SHAMANNA.

A preliminary objection is taken on behalf of the plaintiff that no proceedings could be taken on the application for transfer, because the defendant did not, as required by section 23, Civil Procedure Code, before his application, give notice in writing to the plaintiff of his intention to apply for a transfer. The application is not maintainable without such notice as a condition precedent. (2 Cal., L. R., p. 352).

The record shows that, on the 24th March 1904, after the exparte decree was set aside, the defendant applied for a second time for transfer. It is admitted that, before he filed this second application also, he served no notice in writing on the plaintiff as required by section 23, Civil Procedure Code. The plaintiff did, however, appear the same day, and asked for a fortnight's time to state his objections, and stated his objections on the 8th April 1904.

In our opinion the original Court had no jurisdiction to entertain the application for transfer until the defendant gave notice in writing to the plaintiff of his intention to apply for transfer. This is plain from the provisions of section 23 of the Code.

The application for transfer must accordingly be dismissed on this ground, with costs against the defendant. Pleaders fee Rs. 16.

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# MISCELLANEOUS CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice H. V. Nanjundayya.*

1904. August 27.

EBRAHIM SAB *alias* BIRAM SAB, PLAINTIFF

*v.*

GOPALA SHETTY, DEFENDANT.*

*Small Cause Courts—Jurisdiction—Damages for malicious prosecution, suit for—Provincial Small Cause Courts Act, XI of* 1865, *in force in Mysore.*

*Held*, that the judgment of the Chief Court in Civil Revision Petition No. 64 of 1900-01, holding that Act XI of 1865 (Provincial Small Cause Courts Act) was in force in Mysore had never been dissented from.

SUIT for damages for malicious prosecution. The plaintiff filed the suit in the Sub-Judge's Court of Mysore but the plaint was returned for presentation to the Principal Munsiff on the ground that the suit was not triable by a court of Small Causes. The plaint was then presented to the Principal Munsiff of Mysore who also returned it to the plaintiff for presentation to the Sub-Judge. It was re-filed in the Court of the Sub-Judge who made the following reference to the Chief Court under section 617 of the Code of Civil Procedure.

"Small Cause No. 122 of 1903-04 was a suit for damages for malicious prosecution filed in this court. The then Sub-Judge Mr. P. Singarachar on 26th March 1902 returned the plaint for presentation to a court of original jurisdiction as he held that a suit for damages for malicious prosecution was not triable by a court of Small Causes. On the same day the plaint was presented before the Principal Munsiff of Mysore and after making substantial progress with the trial of the suit including the examination of 8 witnesses for the plaintiff, the Munsiff passed an order on 11—2—04 returning the plaint for presentation to the Subordinate Judge's Court on the Small Cause side with reference to a decision of the Chief Court in Second Appeal No. 98 of 1902-03. I feel doubts as to the correctness of the order passed by the Munsiff. My predecessor's order dated 26th March 1902 returning the plaint was an order appealable under clause (b) of section 588 of the Civil Procedure Code and it is not competent to me to set it aside

* Civil Referred Case No. 1 of 1904-05, from the Sub-Judge of Mysore in Small Cause No. 122 of 1903-04.

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except on review. But the parties have already been put to much expense and great delay in going from court to court and I therefore take the liberty to trouble the Hon'ble the Chief Court to pass final orders on the question of jurisdiction involved in view to meet this and similar cases.

Act XI of 1865 is not in force in Mysore. In the Volume of "Acts introduced into Mysore before the Rendition" published under the authority of the Government of Mysore in the Legislative Department, the Act is omitted and note (b) in page 5 of the Table of Acts prefixed to the body of the book explains that even for the purpose of giving effect to the Rules regarding the constitution and powers of the Civil Courts in Mysore, Act XI of 1865 has ceased to be in force. In Referred Cases Nos. 6 and 7 of 1885 on the file of the Chief Court reported in volume 8, pages 279 and 278, the Chief Court held that Civil Courts exercising Small Cause jurisdiction in Mysore were not Small Cause Courts, that under the authority conferred by the Civil Courts Regulation they exercised in some cases a jurisdiction similar to that of a Small Cause Court and that since they are not Small Cause Courts, they are simply Civil Courts and as such do not preside over two distinct and separate courts. It was further held that the Munsiffs' Courts in Mysore are not courts established under Act XI of 1865 and the provisions of section 20 of that Act are therefore inapplicable to them. If section 20 of Act XI of 1865 is not in force, if the Act itself is not in force, and the Small Cause jurisdiction of Sub-Judges and Munsiffs is created solely by the Chief Courts Regulation, the provision in Act XI of 1865 *extinguishing the jurisdiction of other courts in an area where a Small Cause Court is established under that Act* cannot be held to be in force. Neither the Civil Procedure Code nor the Civil Courts Regulation contains any provision ousting the original jurisdiction of other courts over an area in which one of the courts is invested with jurisdiction to try suits of the nature of Small Causes. Such a provision is only to be found in Small Cause Courts Acts and thus where for instance as in Mysore the Sub-Judge, not as a Small Cause Court which he is not, but as a Sub-Judge, is invested with Small Cause jurisdiction in suits of the nature of Small Causes valued from from Rs. 50 to Rs. 100, such investiture does not oust the original jurisdiction of the Munsiffs in such suits. The Sub-Judge and the Munsiff have thus a co-ordinate jurisdiction and the question as to who should try such suits should be answered only with reference to section 15 and section 57 clause (a) of the Code of Civil Procedure.

The Sub-Judge's Court as well as the Munsiff's Court being held to be one and indivisible with reference to both original and Small Cause jurisdiction, and the Chief Court hold that they 'do not preside over two distinct and separate courts', the circumstance that the Sub-Judge

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adopts the more summary procedure provided for suits of the nature of small causes in the Civil Procedure Code does not make his court a court of a lower grade than that of the Munsiff. Section 57 (a) provides that where the law does not allow any option as to the selection of the court, the plaint shall be returned for presentation to the court appointed by law. This clearly has reference to the provision in the Small Cause Court Acts ousting original jurisdiction of other judges over the area for which a Court of Small Causes is constituted. But in Mysore we have no Small Cause Court Act in force and a provision ousting original jurisdiction has not been embodied in the Civil Courts Regulation. It seems to me therefore in this state of the law that the Sub-Judge can exercise Small Cause Jurisdiction only over areas where there is no Munsiff empowered to try them, as in Chitaldrug, Chickmagalur and Hassan, but that in Mysore and Bangalore his exercising jurisdiction in suits of the nature of Small Causes of a value ranging from Rs. 50 to Rs. 300 would be similar to his exercising jurisdiction in Original Suits up to a value of Rs. 2,500 and open to the same objection under section 15 of the Civil Procedure Code, inasmuch as a court of a lower grade, that of the Munsiff, is in existence competent to try such suits under section 10 of the Civil Courts Regulation and its jurisdiction has not been taken away by any provision of the law. A clause ousting original jurisdiction may be added to section 16 of Act 1 of 1883, or the Small Cause Courts Regulation a draft of which was published in the Gazette more than a year ago may early be brought into force. Meantime I beg the favour of instructions. The records are also sumbitted herewith."

OPINION—This is a reference by the Subordinate Judge of Mysore under Section 617, Civil Procedure Code. The facts of the case are these :—The plaintiff instituted, as a S. C. Suit in the Court of the Subordinate Judge (predecessor of the present Subordinate Judge), a suit for damages for malicious prosecution. The Subordinate Judge held that it was not triable by a Court of Small Causes and returned the plaint for presentation to the proper court. The plaintiff then presented the plaint in the Court of the Principal Munsiff of Mysore. The learned Munsiff after recording some evidence returned the plaint to the Court of the Subordinate Judge (who has made this reference), referring to a decision of this Court in Second Appeal 98 of 1902-03 that a suit for damages for malicious prosecution is triable by a Court of Small Causes. The present Subordinate Judge has observed that he is incompetent to review the order of his predecessor, but in order to save further trouble and

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expense to the parties, he desired this Court to settle the question of jurisdiction of Small Cause Courts in Mysore finally. In their Judgment in Civil Revision Petition No. 64 of 1900-01, this Court has held that Act XI of 1865 (Provincial Small Cause Courts Act) is in force in Mysore and this decision has never been dissented from by the Court. The record is returned.

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EBRAHIM SAB v. GOPALA SHETTY.

## APPELLATE CRIMINAL.

*Before Mr. Justice A. Rangaswami Iyengar and Mr. Justice H. V. Nanjundayya.*

GOVERNMENT OF MYSORE, APPELLANT, (COMPLAINANT)

*v.*

BASETTAPPA, RESPONDENT, (ACCUSED).*

1904. July 18.

*Municipal Regulation of Bangalore City,* 1871, *Sections* 2 *and* 148—"*In or near any street,*" *meaning of—Omission to formally define a "Street" as required under section* 2—*Effect on conviction under section* 148—*Madras Municipal Act IX of* 1867, *section* 153.

The accused was charged before the City Magistrate of Bangalore with an offence under section 148 of the Bangalore Town Municipal Regulation for putting up a mud-roofed shed within his compound without obtaining a license and was acquitted on the ground that the shed was not built 'in or near any street' within the meaning of that section. In appeal against the order of acquittal, it was contended on behalf of Government that the facts of the case came within the definition of the expression 'in or near any street' given in section 2 of the said Regulation.

*Held*, that the Legislature intended that the provisions in Bangalore Town Municipal Regulation (1871) with regard to the words 'street' and 'road' should apply only to the streets and roads in portions of the Municipality which were specially defined by the Municipal Commissioners with the sanction of Government and therefore the provisions of section 148 could be enforced only in such specified parts of the Town of Bangalore.

*Held also*, that as the Municipality had failed to formally define such parts, the acquittal of the accused was inevitable.

* Criminal Appeal No. 128 of 1903-04 against the order of the City Magistrate of Bangalore, in Criminal Case No. 596/Summary Case No. 856 of 1902-03.



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CHARGE under section 148 of the Bangalore Town Municipal Regulation, 1871. The section runs thus:—

"Before beginning in or near any street to erect or restore any building, the person intending to erect or restore such building shall give to the President notice thereof in writing and shall accompany such notice with a plan, showing the level at which the foundation and lowest floor of such building are proposed to be laid, by reference to some level ascertained under the direction of the President; and whoever fails to give such notice, shall be liable to a penalty not exceeding fifty Rupees."

The accused was acquitted by the City Magistrate of Bangalore.

The Government preferred this Appeal under section 417 of the Criminal Procedure Code.

The *Government Advocate* (Mr. *S. Ramaswami Iyer*) for the Appellant.

Mr. *N. Cheluva Iyengar* for the respondent.

JUDGMENT.—The Municipality prosecuted the respondent under section 148, Municipal Regulation, but the City Magistrate acquitted him in Criminal Summary Case No. 596 of 1902-03, holding that the shed built of line was not "in or near any" street within the terms of section 148. The Government have appealed against the order of acquittal under section 417, Criminal Procedure Code.

The facts are not disputed. The respondent's house is situated in Akkipett of the City of Bangalore and he put up a mud-roofed shed within his compound without applying for a license. This shed is separated from the Akkipett Road by a row of shops. The question is whether, under section 148, he was bound to give to the President a notice of his intention to erect or restore the shed in question. The section provides that "before beginning *in* or *near any* street to erect or restore any building, the person . . . . . shall give to the President notice thereof in writing . . . " The case therefore turns upon the interpretation of the words *in or near any street*. These words are defined in section 2 of the Regulation in continuation of definition of the word street, as follows:—"and the expression, in or near any street, shall designate any place within

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such defined parts of the said Town." We have therefore to see what are "such defined parts" of the Town of Bangalore. The definition of the word street as far as it is material for our purpose is "the word street shall mean any road, street . . . . . . within such parts of the said Town of Bangalore as shall be from time to time *specially defined* by the Commissioner with the sanction of the Government of H. H. the Maharajah of Mysore." The reason and meaning of the provision for defining the parts of the Town within which only this definition of street will apply may be gathered from the following considerations.

The expression Municipal limits is defined to mean the limits fixed by Government Notification from time to time. The word Town is defined to comprise the Town of Bangalore and such suburbs thereof and other villages as may be included therein by the above mentioned notification as regards "street" and "road" the definitions provide that they shall have the meaning given to them in the definition only in "specially defined parts of the Town of Bangalore." It appears therefore that the Legislature intended that the provisions in the Regulation with regard to the "street" and "road" should apply only to the streets and roads in portions of the Municipality which are specially defined by the Municipal Commissioners with the sanction of Government. This view is further confirmed by the following circumstances. This Regulation is closely based on Madras Municipal Act IX of 1867. The definition of the word street does not contain the limitation mentioned above but includes "every road, street, etc. *within the Town.*" While the words "' in or near any street' shall designate any place within the Town" and in section 153 which corresponds to section 148 in our Regulation the words " in or near any street" are omitted and the words "within the town" occur. It is thus clear that unlike the intention of the Madras Act it was intended by our Regulation to enforce the provisions of section 148 and similar sections only in specified parts of the Town of Bangalore and the Municipality either from ignorance of this intention or through oversight failed to define formally such parts.

The acquittal of the accused under these circumstances was inevitable and there is no good reason for disturbing it. This appeal is accordingly dismissed.

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## REVISIONAL CRIMINAL.

*Before Mr. Justice A. Rangaswami Iyengar and Mr. Justice H. V. Nanjundayya.*

1904. July 19.

### *In re* ABDUL GAFFUR AND 2 OTHERS.*

*Criminal Procedure Code (Act X of 1882), section 240—Several Charges against the same accused person—Conviction on some of them—Withdrawal of other charges when allowable—Charge, meaning of.*

Three police constables were charged with 26 separate offences of house-breaking and theft in a building in 26 cases before the City Magistrate of Bangalore who convicted them in 10 cases and suspended the enquiry into the remaining 16 cases under section 240 of the Criminal Paocedure Code. On a reference by the District Magistrate who doubted the legality of that procedure,

*Held*, per Justice RANGASWAMI IYENGAR, that section 240 of the Criminal Procedure Code (Act X of 1882) was applicable to charges made in more than one criminal case, that the procedure of the Magistrate in the present instance was correct and that therefore no interference in revision was necessary.

Per Justice NANJUNDAYYA, that section 240 in Act X of 1882 should be construed as being limited in operation to the same trial, but, considering the cases on merits, no further trials appeared necessary even though the order of the Magistrate was to be considered technically wrong.

THE District Magistrate passed the following proceedings and submitted the same to the Chief Court for orders under section 438, Criminal Procedure Code.

"All these cases relate to the commission by Abdul Gaffur, Rahim Khan, and Ahmed Sab, 3 constables of the Bangalore City Police, of offences under sections 457 & 380, Indian Penal Code. The City Police placed charge sheets in 26 cases before the Senior Assistant Commissioner and 1st Class Magistrate in charge of the City Magistrate's Court charging the above 3 accused of the offences of lurking house-trespass or house-breaking by night in order to the commission of an offence punishable with imprisonment and of theft in a building. The Senior Assistant Commissioner Magistrate enquired into ten of these cases and convicted the accused in all of them. As regards the remaining 16 cases he ordered the stay of proceedings in those cases. On information of the same reaching me, I called for the records of those cases under section 435, Criminal Procedure Code. The Magistrate has sent the records and says

* Criminal Revision Cases Nos. 163 to 178 of 1903-04. (Reference by the District Magistrate of Bangalore in No. 1086 dated 11th February 1904 in Criminal Cases Nos. 365,390,391,416 to 428 of 1903-04 on the file of the Senior Assistant Commissioner & 1st Class Magistrate of Bangalore.)

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in his covering docket that he holds that section 240, Criminal Procedure Code, empowers a Magistrate to do so.

'When more *charges* than one are made against the same person and when a conviction has been had on one or more of them,' section 240 enables the withdrawal of "the remaining *charge* or *charges*." In the amended Code of Criminal Procedure in force now in the British Territory, section 240 runs as follows:—

"When a charge containing more heads than one is framed against the same person" &c., the remaining *charge* or *charges* may be withdrawn. That *this* alone was the way in which the old Code which is the one in force in Mysore was interpreted is apparent from the Bombay High Court Criminal Rule No. 5 of 16th February 1888 in which it was ruled that the permission of withdrawal is allowable in the *same case only*.

I would therefore request under section 438, Criminal Procedure Code, that the Chief Court of Mysore exercise its revisional powers under section 439, Criminal Procedure Code, and direct that these remaining 16 cases be proceeded with to termination according to their merits."

Order.—Mr. Justice A. RANGASWAMI IYENGAR:—Three Police Constables of the Bangalore City were placed by the Police before the City Magistrate, for 26 separate offences of housebreaking and theft in a building. The Magistrate tried and convicted them in 10 cases and suspended the enquiry into the remaining 16 charges. The District Magistrate has referred the cases for revision under section 435, Criminal Procedure Code.

2. In the 10 cases which were tried, the Magistrate has awarded an aggregate sentence of 54 months or 4½ years against each of the accused. For the ends of justice, there is scarcely any need for the trial of the remaining cases or infliction of additional punishment. It is very probable that, even if the further trial of the accused be ordered, the sentences can only be nominal. The question is purely one of construction of the wording of the section on this point. Act X of 1882, as amended by Regulation 1 of 1886, was in force when the Magistrate passed his order and hence, though it has been superseded by Regulation II of 1904, which came into operation on 1st April 1904, we have to see whether the action of the Magistrate is illegal according to the terms of section 240 of Act X of 1882.

3. The section runs:—"When more charges than one are made against the same person and when a conviction has been had on one or more of them, the complainant or the officer conducting

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the prosecution, may, with the consent of the Court, withdraw, the remaining charge or charges or the Court of its own accord may stay the enquiry into, or trial of, such charge or charges. Such withdrawal shall have the effect of an acquittal on such charge or charges, unless the conviction be set aside in which case, the said Court (subject to the order of the Court setting aside the conviction) may proceed with the enquiry into or trial of the charge or charges so withdrawn."

The first question is, what is the *meaning* of the word *charge* as used in this section. The second point for consideration is, whether the section applies to charges made in one Criminal Case only or in more than one. Before discussing them, it is desirable to examine briefly into the origin of this provision.

4. This provision did not find a place in Act XXV of 1861 and was first enacted as section 379A in Act VIII of 1869 which was passed as a part of the former.

This section is as follows:—"In trials before a Court of Session when more charges then one are preferred against the same person, and when a conviction has been had on one or more of them, the Government Pleader or other officer conducting the prosecution, may, with the consent of the Court, withdraw, or the Court of its own accord may suspend the enquiry into the remaining charge or charges."

5. The provision was restricted to the Court of Sessions alone. The expression "*In trials* before a Court of Session" is capable of being interpreted to mean either more than one trial of the same person on several charges or it may have been used only in a general sense to mean "any trial." As the provision was applicable only to a Sessions Court, the word *charges* would naturally be taken to have been used in the technical sense, in which it is used in Act XXV of 1861, namely, the formulation or statement of the offence or offences which the Committing Magistrate has framed against the accused, though the use of the word 'enquiry' in the expression "*suspend the enquiry into*" would appear to be inconsistent with the definition of 'enquired into' in Act XXV of 1861.

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6. The meaning of the words *charge* and *charges* as used in this section may further be illustrated by a reference to the provisions of Act XXV of 1861, Chapter XIII, " of the charge." 1904.

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Section 233 provides that when the Magistrate has determined to send the accused person before the Court of Session for trial, he shall make a written instrument under his hand and seal, declaring with what offence the accused person is charged. . . . . . . and section 238 is as follows :—" The charge may contain one or more heads." These words would seem to imply that a count in a charge sheet could not appropriately be styled a charge and that whatever the number of counts in a charge sheet, it would be called a *charge* and not *charges*.

Section 239 prescribes the form when a charge contains one head only and the following sections 240, 241 and 242 prescribe the cases in which the charge may contain more heads than one and section 243 gives the form of the charge in such cases. Section 244 provides that any court before which, a trial is held, may alter *the charge.*

7. I refer in this detail to these provisions as they seem clearly to point to the fact that in this Code, the word *charge* was invariably meant to denote a charge sheet whether it contained one count or more and was not applied to a single count only where a charge contained more than one count.

8. It may also be observed that these provisions contemplate the framing of a single charge of one or more counts only when more offences than one are made out from a single set of facts and that the enactment did not contain any provision for one charge sheet, containing counts of a number of offences of the same description committed at different times.

9. From these facts, I think, it follows that section 379A was clearly applicable to the case of a person who had been committed to the Sessions on more than one charge sheet and in more than one case. I must, however, observe that, in the absence of the Select Committee's Report and discussions on this enactment, I am not able to ascertain under what circumstances and with what object this

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provision was enacted. But in support of my conclusion, may be quoted Criminal Letter No. 592, dated 11th May 1870 issued by the Calcutta High Court. See page 6, Criminal Letter, Volume XIII, S. W. R. In this case, besides the charge under section 302 I. P. C., there was another, namely, attempt to commit suicide which was withdrawn under section 379 A. It was ruled by Jackson, J. "The withdrawal of the charge of attempt at suicide by the prosecutor was not the proper procedure in the case, though the Court of Sessions is competent to allow additional charges to be *upon one or more* (sic). The provisions of section 379A are clearly meant to apply to those cases in which prisoners are accused of several distinct crimes for which *separate trial* is necessary. Here, there were merely several heads of charge arising out of the same case. And the prisoner ought apparently to have been convicted on both: though of course, no further punishment could be inflicted."

10. Acts XXV of 1861 and VIII of 1869 were superseded by Act X of 1872. The wording of section 379A of VIII of 1869 was re-enacted as section 459 without any change except for the addition of the words "or High Court," thus extending the provision to this class of courts also. This, however, does not affect the nature of the provision. In his History of Criminal Law, Mr. Justice Stephen is reported to have said in a note on sections 221, 240 of Act X of 1882 (Chapter relating to charges and withdrawal of remaining charges on conviction of one or more charges). "I drew these sections in the Code of 1872. They are re-enacted with little alteration." And Sir Whitley Stokes has stated in his introduction to the Anglo-Indian Codes that this code was drafted partly by Sir F. James Stephen, partly by Mr. H. S. Cunningham, but chiefly by the late Captain Newbury, Personal Assistant to the Inspector General of the Punjab Police. In this Act, for the first time was the *word* charge used in the sense of a count or head in a charge sheet as well as for a collection of such heads or counts.

11. Section 44? provides that the charge may be in the form given in the III schedule or to the like effect. Section 452 is new and lays down that there must be a separate charge for every distinct offence of which any person is accused and every such charge must be tried separately except in the following cases.

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Section 453. Three offences of one kind committed in a year.

Section 454. All offences committed by a person in the same transaction.

Section 455. Where it is doubtful which of several offences had been committed.

12. But there is nothing in these provisions to indicate that the Legislature contemplated any change in the nature or scope of section 459. As already observed, Justice Stephen, who drew up these provisions, did not observe that any change was made or intended. (In the Report of the Select Committee on this Act, the remark made against this Chapter is, that this Chapter was re-drawn with a view to increased simplicity and that provisions on joinder of several charges in a single trial and of several persons in a single charge have been introduced. And there is no reference to any change in the provisions of section 459).

Captain Newbury, who took a prominent part in the passing of this Code, has, in his commentaries on this Code, quoted the Ruling by Jackson, J., referred to, at para. 9 above, without dissent or remarks.

This principle, empowering a court to suspend the trial or enquiry into charges, was, then, extended to the Court of the Presidency Magistrate by Act IV of 1877 and the wording of section 112 of this Act, may also be quoted in support of this view.

13. The section is, as follows :—" When more charges than one are made against the same person, and when a conviction has been had on one or more of them, the complainant, or the Government Solicitor or other officer, conducting the prosecution, may, with the consent of the Presidency Magistrate, withdraw, or such Magistrate of his own accord, may suspend, the inquiry into, or trial of, the remaining charge or charges."

The power to withdraw is given to the complainant, or Government Solicitor or other officer, conducting the prosecution, and the Magistrate is empowered to suspend the enquiry into or trial of the remaining charge or charges. As, according to the definition of the



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words "trial" and "enquired into" in Act X of 1872, proceedings taken after a charge has been framed cannot properly be termed an enquiry, the words "charge or charges" should, it appears to me, be taken in the ordinary sense of an accusation of an offence as well as in the technical one assigned to it in the Chapter on charges of the Criminal Procedure Codes. Moreover, this view receives further support from the fact that, unlike the Sessions Court, the Presidency Magistrates have to entertain complaints or accusations of offences and have to make enquiries into them before framing formal charges.

14. In supersession of Acts X of 1872, X of 1875 (applying to the Proceedings of the High Courts), IV of 1877 (Presidency Magistrates' Act), &c., Act X of 1882 was passed. Sir Whitley Stokes says that it was framed by him recasting the Code of 1872, combining with it, the substance of the High Courts' Act and the Presidency Magistrates' Act and incorporating in it, the numerous reported decisions on its wording so as to "give India a single and complete Code of Criminal Procedure." He says further, that the language and arrangement of Act X of 1872 were, for obvious reasons, departed from, only so far as was necessary for the main purpose of the Code.

Referring to Chapter XIX regarding charges, Sir W. Stokes has remarked that "It extends to the whole of British India, the amendments in Act X of 1872, sections 439 to 459, made in the Presidency Towns, Allahabad and Lahore *by Act X of* 1875." (It is a question if Act IV of 1877, Presidency Magistrates' Act, was not also intended by the author.)

15. Comparing the wording of section 240 of Act X of 1882 with section 459 of Act X of 1872 and section 112 of Act IV of 1877, it will be seen that, the wording of the first sentence of the former is almost verbatim with that of section 112, omitting, for obvious reasons, the words, "the Government Solicitor or other" and substituting the word "stay" for the word "suspend." The second sentence is new and supplies a very useful provision which was implied in the word 'suspend.' Even this alteration serves to shew that the use of the words "enquiry into" such charge or charges so withdrawn gives further emphasis to my argument.

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It will be seen that the effect of this section is to extend to all Magistrates' Courts, a provision which was heretofore applicable only to trials before Courts of Session, or High Courts and the Presidency Magistrates' Courts. The meaning assigned to the words "charge or charges" as used in section 112 should apply to the said words in the present Act with even greater reason.

16. Prinsep, J. does not refer in his commentaries, to any reported decision on this section or make any comment on the question whether the section applied only to charges in the same case. (See 11th Edition of 1895). He however invites attention "to Raghunandan Lall, W. N. 1889, page 8 for an instance of the application of this section." But I have not been able to get a copy of this book.

17. In Sohoni's commentaries, 5th edition 1901, a case is quoted from 10 C. page 1 (I am unable to say what report is referred to, as C. P. I. is not found in his list of abbreviations), as authority for holding that this section only applies to charges formally framed under Chapter XIX. It is not also clear whether this ruling was passed with reference to Act X of 1882 or to the later one of 1898 with which we are not concerned.

18. In his notes under the heading of "permission of withdrawal is allowable in the same case only," the same author quotes the Ruling of the Bombay High Court in Sadia dated 1tth February 1888, which must clearly have been passed under Act X of 1882. No reasons are given in this order but the question appears to be assumed as one admitting of no doubt.

Another Ruling of the same Court dated 8th September 1898, is quoted next. But this probably falls under Act V of 1898 which came into force in July 1898. It is, however, worthy of notice that the Ruling does not apparently make any difference between an accusation and a formal charge under Chapter XIX and in this view, it may be taken to be confirmatory of my opinion, at para 13.

19. The next case quoted is Amerchand, 24 Punjab Rc. Cr. J. No. 24 of 1889. It is observed in this Ruling that "This section applies to a case where a person is accused of several offences and not to a case where several formal charges have been drawn up by

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the Court against him. It may also apply to a case where there are charges of several distinct offences constituted by separate acts, or separate sets of acts, e. g. charges falling under section 234 or 235, sub-section 1, *ante*." This distinctly supports my contention though the expression of this opinion was not necessary for the disposal of the case before that Court. These are all the precedents that could be traced.

20. Though Act V of 1898, which was passed in supersession of Act X of 1882, does not govern the present case, it is desirable to refer to the provisions in it applicable to the question in hand to ascertain the intention of the Legislature. In this Act, also, the section is numbered 240 and is exactly same in wording as the corresponding section of Act X of 1882 except that the words "When more charges than one are made against the same person" have been altered to "When *a charge containing more heads than one, is framed* against the same person."

It is clear from this change that the section can be applied only when more heads of charge than one, have been framed *in the same case*. If any force is to be given to the word *framed* we may also gather that the section will apply only to a case where a charge has been drawn up and that cases in which the accusations have not yet been enquired into and *charges framed* are excluded from the operation of this section.

21. It must, however, be remarked, with all respect to the authorities, who drafted the Code, that the word *charge* has been used in different meanings in different parts of this section. Though, according to the definition of the word *charge*, there is no inaccuracy in such use, yet considering the object with which the expression "more charges than one" was altered to "a charge containing more heads than one" it is inartistic if not inconsistent to retain the word charge or charges in the sense of count or counts of charge and it would have been more satisfactory if the words "the remaining head or heads of charge" had been substituted with suitable alteration of other expressions in the section.

22. There can thus be no doubt, that, according to the latest Act, the scope of the section is very materially narrowed. As it is necessary for our purpose to consider whether this is a change deli-

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berately introduced by the Legislature, or is only a more accurate and unambiguous rendering of the provision as it always was, it is desirable to discuss also the nature and advantages of the provision. In its most general application, the effect of this provision will be, to stay or dispense with the enquiry into or trial of some accusations or charges against a person when he has been convicted on one or more accusations or charges against him. The permission given by the section will be brought into operation when the sentence passed against the accused is considered sufficient for the ends of justice and when it is thought unnecessary to subject him to further trial or punishment unless the conviction already passed should be set aside. It would also have the effect of saving the time of the Court and expenses, worry and time to the parties and witnesses concerned.

23. As the section now stands, it can be applied only when preliminary enquiry has been held and charge or charges have been framed in the following cases.

When not more than three offences of the same kind have been committed by the accused, (section 234).

When, in one series of acts so connected as to form the same transaction, more offences than one have been committed.

When the acts alleged constitute an offence falling within two or more separate definitions.

When the acts constituting one offence, constitute a different offence when combined, clauses 1, 2 and 3 of section 235.

24. Is there any necessity for or advantage in so limiting the operation of this provision? It may be admitted that the Court concerned would have a more difficult discretion to exercise in the wider scope of the section. But when it is seen that the complainant or the prosecuting officer has first to apply for Court's permission and that Courts will not generally stay enquiry or trial except on the application of either of them, except in rare instances, and that, when they do so in spite of their protests, their action could be set right in revision, it may fairly be asked whether the balance of public convenience does not favour a more extended scope of the provision. I have already given my reasons for holding that section

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240 of Act X of 1882 with which we are concerned fairly admits of the interpretation vesting in Magistrates the more extended discretion, whatever may be the law under the new Regulation.

For these reasons, I consider, that there is no call for our interference in the present case.

Mr. Justice H. V. NANJUNDAYYA:—The provision having been altered in Mysore also, as stated in para 21 of this order, there will no longer be any doubt about the applicability of the provision in future.

I am inclined to think that the section in the Act of 1882, should be construed as being limited in operation to the same trial. Otherwise, if there are quite independent and unconnected cases against the same person (*e. g.* hurt, adultery, robbery, murder, defamation, at different times), why should conviction in one, be considered sufficient excuse to withdraw the other cases? Moreover, what materials would a Court have before it to judge of the expediency of allowing the remaining cases (not tried before it) being withdrawn?

There are, however, cogent reasons as pointed out in Mr. Justice Rangaswami Iyengar's order in favour of a more liberal interpretation. I may perhaps add to them the fact that though there are many heads in a charge, the case is tried as one, and by the time it arrives at the stage of 'conviction' there is no more 'inquiry' remaining at all on any of the heads.

Considering the cases before us, on the merits, I agree with my learned colleague in holding that no further trials are necessary, even if the orders, withdrawing the cases from trial, are held to be technically wrong. The records may be returned.

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# REVISIONAL CRIMINAL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

*In re* THIMMA AND ANOTHER, (ACCUSED).*

1904. August 5.

*Criminal Procedure Code, section* 389—" *Successor in office,*" *meaning of.*

A " Successor in Office " in section 389 of the Criminal Procedure Code must mean not only a successor in official name and area of jurisdiction but a successor to the official powers of his predecessor.

Charge of robbery. Two persons were convicted and sentenced by the 1st Class Magistrate of Kadur but judgment was pronounced in the absence of one of the accused persons and when that accused person was arrested and brought before the same court, a Second Class Magistrate was presiding over it. The case was referred to the Chief Court for orders under the circumstances which are set out in the following letter of reference from the District Magistrate of Kadur:—

"I have the honor to report that in Criminal Case No. 16 of 1902-03, on the file of the 1st Assistant Commissioner and 1st Class Magistrate of this District, accused Thimma and Muniyah were tried by the presiding Magistrate Mr. C. D. Ramaswamaiya for the offence of robbery under section 392 of the Indian Penal Code. The case for the prosecution was closed on the 1st December 1902, and a charge was framed and explained to the accused on that day. The defence witnesses were all examined on the 10th December 1902 in the presence of both the accused, with a single exception. The summons issued to this defence witness not having been duly served, the case was adjourned on the 10th December to the 22nd idem, and finally to the 2nd January 1903, on which day, that witness was examined in the presence of only the 2nd accused Muniyah. The 1st accused Thimma not having been produced before the Magistrate on the 2nd January 1903, the latter wrote to the Officer in charge of the District Lock-up, where the former had been confined and received a reply on the 3rd January to the effect that accused Thimma has escaped from custody on the 23rd December 1902.

2. On the 2nd January 1903, the Magistrate Mr. C. D. Ramaswmaiya, delivered his judgment convicting both the accused Thimmah and

* Criminal Revision Case No. 9 of 1904-05. (Reference from the District Magistrate, Kadur, in letter No. 30 dated 7th July 1904 in Criminal Case No. 16 of 1902-03, on the file of the 1st Assistant Commissioner and 1st Class Magistrate of Kadur.)

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Muniyah of the offence with which they had been charged and sentencing them each to one year's rigorous imprisonment and a fine of Rs. 10/-, in default to suffer additional rigorous imprisonment for 4 months. The 2nd accused Muniyah alone was present to hear the judgment delivered on the 9th January 1903 and as regards the 1st accused Thimmah, the Magistrate directed that a warrant should issue for his arrest.

3. The 2nd accused Muniyah having appealed to the Court of Sessions, Shimoga Division, against Mr. C. D. Ramaswamaiya's sentence, the Sessions Judge altered the conviction by finding the appellant guility of an offence falling under section 379 of the Indian Penal Code and reduced the sentence to three months' rigorous imprisonment.

4. In accordance with the warrant issued on the 9th January 1903, the 1st accused Thimmah was arrested on the 2nd July 1904 and has been sentenced by the 1st Assistant Commissioner and 2nd Class Magistrate of this District to two months' rigorous imprisonment for the offence of escaping from lawful custody, under section 224 of the Indian Penal Code.

5. Mr. C. D. Ramaswamaiya, who wrote the judgment in the Case No. 16 of 1902-03 on the file of the 1st Assistant Commissioner and 1st Class Magistrate's Court, no longer presides over that Court. Mr. Chokkanna who is only a 2nd Class Magistrate is the presiding Magistrate of that Court at present.

6. Now that the 1st accused Thimmah has been arrested and can be brought before Court, the question arises as to whether Mr. C. D. Ramaswamaiya's judgment written on the 9th January 1903 can now be read to the said accused and a warrant issued for the execution of the sentence passed on him therein, and if so, by which Magistrate these acts can legally be performed.

7. In the present case the judgment may be taken to have been pronounced on the 9th January 1903 by Mr. C. D. Ramaswamaiya in the absence of the accused Thimmah. It has been held in *re* Gangadharappa (Criminal Revision Case No. 46 of 1898-99 on the file of the Chief Court, reported at page 215 Volume IV, 1899, Mysore Chief Court Reports) that there is nothing in section 366 of the Criminal Procedure Code to render illegal the delivery of a judgment in the absence of the accused. It follows from this ruling that if Mr. Ramaswamaiya were now presiding over the 1st Assistant Commissioner's Court he would be competent to send for the accused to attend the court to hear the judgment, and direct the

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execution of the sentence according to law,—but the Magistrate now presiding over that court is Mr. Chokkanna who is only a 2nd Class Magistrate. I am therefore doubtful if the latter Magistrate can legally pronounce the judgment written by his predecessor, who was a 1st Class Magistrate; and I beg to be favoured with the orders of the Chief Court on the point. If it is considered unnecessary that the judgment should now be pronounced for the second time in the presence of the accused, I beg to be instructed if Mr. Chokkanna can issue a warrant for the execution of the sentence. 1904. THIMMA.

8. As accused Thimmah will be released from jail on the 5th September 1904, I beg that orders on this reference may kindly be communicated to me at least a week before that date."

ORDER.—We think that the proper course is to order a new trial of the accused Thimma for two reasons. In the first place, judgment was pronounced by the Magistrate after examining one witness in the absence of the accused or any pleader for him and thus the accused could not cross-examine him. In the next place, the successor of that Magistrate who was of the first class is a Magistrate of the second class and therefore we think is not a successor in office within the meaning of section 389, Criminal Procedure Code, of the former Magistrate so as to be able to issue a warrant to carrry out a judgment pronounced by the 1st Class Magistrate. In our opinion 'a successor in office' must mean not only a successor in official name and area of jurisdiction but a successor to the official powers of his predecessor.

Order for retrial accordingly.



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# REVISIONAL CRIMINAL.

*Before Mr. Justice H. V. Nanjundayya.*

*In re* DASA AND ANOTHER, APPELLANTS, (ACCUSED).*

1904. September 3.

*Criminal Procedure Code, section 421—Appeal—Summary dismissal—Order for reduction of sentence notwithstanding—unenforceable.*

In summarily dismissing an appeal under section 421, Criminal Procedure Code, the Sessions Judge of Mysore ordered that the sentence of fine should be set aside. The Chief Court on revision,

*Held*, that as section 421 of the Criminal Procedure Code allowed the summary rejection of an appeal when the Judge saw no grounds to interfere, the opinion of the Sessions Judge about the reduction of the sentence could not be enforced.

CHARGE under sections 380 and 457, Indian Penal Code. The accused were convicted of offences under those sections and sentenced to undergo rigorous imprisonment for 6 months and to pay a fine of Rs. 100 or in default to undergo additional rigorous imprisonment for 2 months, by the General Assistant Commissioner and 1st Class Magistrate of Hassan. They preferred an appeal to the Sessions Judge who summarily rejected it and ordered the sentence of fine to be set aside.

The Chief Court in the exercise of its Revisional powers passed the following

ORDER.—When rejecting an appeal under section 421, the learned Sessions Judge has expressed an opinion that the sentence of fine awarded by the Magistrate in that case, should be set aside. Section 421 only allows the summary rejection of an appeal, when the Judge sees no grounds to interfere. The opinion about the reduction of the sentence cannot therefore be enforced; but as the Judge considers that a modification of the sentence is necessary, the order of summary dismissal is erroneous, and is set aside.

The Sessions Judge will admit the appeal and dispose of it on its merits in due course.

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* Criminal Revision Case No. 31 of 1904-05 (Order of the Sessions Judge of Mysore in Criminal Appeal No. 1 of 1904-05).

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## REVISIONAL CRIMINAL.

*Before Mr. Justice A. Rangaswami Iyengar and Mr. Justice H. V. Nanjundayya.*

CHELUVE GOWDA, Accused, (Petitioner) 1904. July 22.

*v.*

HUCHI, Counter-Petitioner, (Complainant).*

*Criminal Procedure Code, sections* 517, 520—*Theft of bullocks—Conviction by a 3rd Class Magistrate—Delivery of bullocks to complainant ordered—Appeal—Reversal of conviction by District Magistrate—Order regarding disposal of bullocks undisturbed—Legality—Power to order restoration after delivery.*

A 3rd Class Magistrate convicted the accused of an offence of theft of a pair of bullocks and ordered that the bullocks should be delivered to the complaintant. In appeal, the District Magistrate set aside the conviction but declined to interfere with the order of the Lower Court regarding the disposal of bullocks. On Revision,

*Held*, that as there was no imperative provision that restoration of property should follow a reversal of conviction, it could not be said that the District Magistrate was wrong in declining to set aside the order on the view that he took of the case.

*Held also*, that when an order for delivery of property had been carried out, there was no provision in the Code of Criminal Procedure to order restoration.

In re *Annapurnabai*, *I. L. R.*, 1 *Bom.*, 630; In re *Ratanlal Rangildas*, *I. L. R*, 17 *Bom.*, 748; and *Queen Empress* v. *Ahmed*, *I. L. R.*, 9 *Mad.*, 448, *referred to.*

Order for disposal of property under section 517, Criminal Procedure Code. The accused who was charged with the offence of theft of bullocks, was convicted of the same by the 3rd Class Magistrate of Kunigal and the bullocks were delivered to the complainant under an order of the same Magistrate. The District Magistrate, in appeal, reversed the conviction and acquitted the accused but without making any order regarding the restoration of the bullocks. On an

* Criminal Revision Petition No. 127 of 1903-04 praying that the order of the District Magistrate of Tumkur, confirming that of the 3rd Class Magistrate of Kunigal in Criminal Case No. 28 of 1903-04, may be revised.

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application put in by the accused praying that the bullocks may be restored to him, the District Magistrate held that the order of the 3rd Class Magistrate should stand good.

Against that order, the accused preferred this Criminal Revision Petition.

Messrs. *L. Sreenivasa Iyengar* and *C. S. Doraswami Iyer* for the petitioner.

The Counter-Petitioner being absent.

ORDER.—The Taluq Magistrate of Kunigal convicted the petitioner of an offence of theft of a pair of bullocks and ordered that the bullocks should be returned to the 1st prosecution witness, the complainant. On appeal, the District Magistrate of Tumkur set aside the conviction; but left the order about the disposal of the property undisturbed. The petitioner presented a petition for the cancellation of the order: but the District Magistrate by another order confirmed the Taluq Magistrate's order, saying that, when passing his judgment, he had not considered it necessary to interfere with it. The petitioner asks this Court to revise this order, on the ground that, as the District Magistrate held that no offence had been committed, he was bound to direct that the property should be returned to the party from whom it was taken.

The Amildar Magistrate's order was passed under section 517 of the Criminal Procedure Code and was quite consistent with the decision arrived at by him. It is not said anywhere in the Code, that, when a conviction in such a case is reversed, that the order about disposal of the property should also be reversed, as a matter of course. Section 520 gives the Court of Appeal (or Revision) to modify, alter, or annul such order. The District Magistrate, however, did not choose to exercise this power; and his reasons, though not expressly stated, can be gathered from his judgment.

The defence set up in the case was, that the complainant's son had delivered the bullocks in satisfaction of a debt due. The learned District Magistrate held that this was in a way made out; but materially qualified his opinion by adding—"The social status of the complainant, and the accused induces one to suspect the fairness

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of the transaction, and there seems to be some reason to believe that the accused took undue advantage of the complainant." 1904.

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There are authorities to show that, when no offence has been committed, the Court is not empowered by section 517 to give over the property to the complainant, but the property should be restored to the person from whose possession it has been taken. (*In re*: Annapurnabai, I. L. R., 1 Bom., 630. *In re*: Ratanlal Rangildas, 17 Bom. 748 also followed in other High Courts.) But this case is distinguishable, as the order to deliver possession to the counter-petitioner was passed by the Magistrate who found that an offence had been committed and who, therefore, had jurisdiction to pass it. The District Magistrate, who reversed the conviction, merely declined to exercise the power vested in him; and as there is no imperative provision that restoration of property should follow a reversal of the conviction, we are not prepared to say that he was wrong in declining to set this order aside on the view that he took of the case. (*See* Q. E. *v.* Ahmed, I. L. R., 9 Mad., 448).

Moreover, there are rulings to show that, when an order for delivery of property has been carried out, there is no provision in the Code of Criminal Procedure to order restoration. (*In re* Annapurnabai, &c.)

Petition rejected

## REVISIONAL CRIMINAL.

*Before Mr. Justice A. Rangaswami Iyengar and Mr. Justice H. V. Nanjundayya.*

T. NANJOONDAYYA, PETITIONER, (ACCUSED)

*v.*

GOVERNMENT OF MYSORE, COUNTER-PETITIONER.*

1904. August 2.

*Criminal Procedure Code, sections* 176, 476—*Magistrate holding enquiry under section* 176—*Court—Witness examined therein—order directing his prosecution*—Ultra Vires.

During an enquiry into the cause of death of a certain person under section 176, Criminal Procedure Code, a Magistrate being of opinion that a

* Criminal Revision Petition No. 144 of 1902-04, against the order of the 2nd General Assistant Commissioner and 1st Class Magistrate of Tumkur in Criminal Mis. Case No. 33 of 1903-04.

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witness examined before him had committed an offence under section 192, Indian Penal Code, ordered that the witness should be tried for that offence.

*Held*, that a Magistrate, when acting under section 176, Criminal Procedure Code, was not a court; that the only consequence of this conclusion would be that if a prosecution was considered necessary it would have to be initiated in the manner laid down in section 195 of the Code and not in the more direct one laid down in section 476; and that the order of the Magistrate directing the prosecution of the petitioner should be quashed as it was passed without jurisdiction.

ENQUIRY under section 176, Criminal Procedure Code. An Hospital Assistant granted a *post-mortem* certificate with regard to the cause of death of a certain individual and was afterwards examined as a witness before the 2nd General Assistant Comissioner and 1st Class Magistrate of Tumkur who held the enquiry. The Magistrate found the facts stated in the certificate to be false and ordered the Hospital Assistant to be prosecuted for fabricating false evidence, an offence punishable under section 192, Indian Penal Code.

The accused (Hospital Assistant) preferred this Revision Petition to the Chief Court.

Mr. *J. C. S. Lawrance* for Mr. *J. Krishna Rao* for the petitioner.

The *Government Advocate* for the counter-petitioner.

ORDER.—The petitioner, who is a First Class Hospital Assistant employed in Sira Taluq made a post-mortem examination of the body of one Hanumantha, which the Police took out of a well and sent to him. In the report that he furnished, he stated that "both the testes are missing and scrotum torn away." The 2nd General Assistant Commissioner and 1st Class Magistrate of the Tumkur District, who held an inquiry under section 176 of the Criminal Procedure Code into the cause of the death of the said Hanumantha, considered that this was a false entry, and under section 476 of the Code, he directed that the Hospital Assistant should be prosecuted for fabricating false evidence.

The first objection taken to this order is that the Magistrate had no power to act under section 476, when he was engaged in an enquiry under section 176 of the Procedure Code. The authorities empowered to act under this provision are Civil, Criminal or

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Revenue Courts. A Magistrate, acting under section 176, has, according to it, all the powers which he would have in conducting an enquiry into an offence. 'Inquiry' includes every enquiry other than a trial held by a Magistrate. The word court is not defined in the Procedure Code, but its definition has to be adopted from the Penal Code. (S. 5 of Criminal Procedure Code, last cl.) In the latter, a 'Court of Justice' which is merely a fuller expression for 'Court' is defined as denoting a judge who is acting judicially, and a judge is defined as a person empowered by law to give a definitive judgment. The illustration (d) appended to this definition (S. 19) says expressly that a Committing Magistrate is not a Judge. It follows from this that a Magistrate, when acting under section 176, (who has only the powers of a Magistrate holding an enquiry) is not a Court. It is true that he is empowered to take evidence on oath; and it does not follow that persons, appearing before him in the course of such inquiry, can perjure themselves with impunity. The only consequence of this conclusion, would be, that, if a prosecution is considered necessary, it will have to be initiated in the manner laid down in section 195 of the Code, not in the more direct one laid down in section 476.

The next question is, whether the Hospital Assistant can fairly be held or presumed to have fabricated false evidence under section 192 of the Penal Code. It may be conceded (though there is some doubt on the point) that this proceeding was a judicial proceeding, as the Magistrate could take evidence on oath. But under section 192, it is necessary to show that the petitioner intended that the false statement may appear as evidence in a judicial proceeding. There was no accusation of any offence in connection with this death against any person: and there was nothing to indicate to the Hospital Assistant that the case would have to go before any Court or Magistrate at all. It is not quite certain that this certificate could be legally used as evidence in any Criminal Case: (Roghuni Singh v. The Empress, I. L. R. 9 Cal., 455), but that question need not be decided in this case. It is more likely that the act of the Hospital Assistant might be held to fall under section 167 of the Penal Code.

The petitioner being a first Class Hospital Assistant, is not removable from his office without the sanction of Government. If

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the prosecution is under section 193, I. P. C., it may be held that section 197 of the Procedure Code does not apply, for that offence would be complete all the same whether the accused is or is not a public servant. For a prosecution under section 167, P. C. to succeed, it should be established that the accused was a public servant when he committed the act; and the sanction of Government would be required before launching it. The petitioner having, in his statement before the Magistrate, deposed to the same effect as in the certificate, it was perhaps open to have prosecuted him for giving false evidence. But that is not the act for which he is being prosecuted.

On the merits of the case, and on the expediency of the petitioner being prosecuted on such evidence as can be produced against him in this case, we express no opinion at present.

We direct that the order of the Magistrate, directing the prosecution of the petitioner, be quashed, as it was passed without jurisdiction.

## APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

1904.
October 10.

DODDA TIMMA AND 2 OTHERS, APPELLANTS, (DEFENDANTS Nos. 2, 3 and 4)

*v.*

MUTTA AND ANOTHER, MINORS BY MOTHER AND GUARDIAN THIMMAKKA, RESPONDENTS, (PLAINTIFFS).*

*Non-joinder of parties—Joinder of co-plaintiff after expiry of time, effect of—Indian Limitation Act, section 22—Suit to recover a debt brought by one of two persons jointly entitled to sue.*

Where two undivided brothers were jointly entitled to recover a debt due to their deceased father, one of them alone brought a suit and when objection was taken by the defendants on the ground of non-joinder of parties, the other brother was added as co-plaintiff. The defendants contended that the suit

* Second Appeal No. 153 of 1903-04 against the decree of the Sub-Judge of Bangalore in Appeal No. 5 of 1903-04 reversing the decree of the Court of the Munsiff of Doddaballapur in O. S. No. 917 of 1900-01.

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was time-barred as more than three years had elapsed since the date of the bond when the other brother was added as co-plaintiff.

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*Held*, that as the two plaintiffs were jointly entitled to the debt as members of an undivided Hindu Family, the 1st plaintiff could not sue alone and therefore the claim was barred under section 22 of the Limitation Act when the 2nd plaintiff was added as a co-plaintiff.

*Held also*, that the 1st plaintiff was not entitled to recover at least half the amount sued for as he could not claim in this suit his half share in the joint family property.

SUIT on a bond. The Munsiff of Doddaballapur dismissed the suit. In appeal, the Sub-Judge of Bangalore reversed the Munsiff's decision and passed a decree in favour of plaintiff.

The defendants preferred this Second Appeal.

Messrs. *B .Nanjundappa* and *S. Ranganna* for the appellants.

Mr. *C. Sesha Char* for the respondents.

JUDGMENT.—One Muttiah, deceased, was father of the two minor plaintiffs. Their divided uncle instituted this suit on behalf of the minor 1st plaintiff alone for the recovery of Rs. 140 due under a bond dated 10th June 1898 executed by 1st defendant in favour of the deceased Muttiah. The defendants denied the genuineness of the document and the right of 1st plaintiff alone to sue as he had a brother in the person of the 2nd plaintiff. The latter was then added as a party but as the suit had been instituted on the last day before the document became barred by limitation, the Munsiff raised the further question whether the claim was time barred.

The Munsiff found for the defendants on all the points and dismissed the suit. In appeal the Sub-Judge held that the genuineness of the bond was fully established, that the defendants had not expressly pleaded that the suit was bad for non-joinder and that no issue had been raised on the point and decreed the claim in favour of 1st plaintiff alone.

This is an appeal against that decision. On the question of fact the learned Sub-Judge appears to have correctly appreciated the oral evidence in the case. We concur in his finding that the plaint



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bond is genuine and that the amount sued for is due. But the question of limitation seems unfortunately to be fatal to the case of the plaintiffs. The Sub-Judge is not correct in saying that the defendants did not object to the suit on the score of non-joinder of parties. By para 5 of the written statement it was pleaded that the suit was void for non-joinder as the plaintiff had a minor brother who was not a party to the suit. At the time of issues this defect was ordered to be cured by bringing the 2nd plaintiff on record. But owing to oversight of the fact that the suit was filed on the last day or of the question of law as to limitation, no specific issue was framed on this point. But the notes of the Munsiff show that the defendants' Pleader did take the objection of limitation after the plaintiffs' case was closed. There is therefore no justification for the remark of the Sub-Judge that this defence was not pleaded at the proper time. As regards the question of law itself, the decision of Sir Charles Sargent, Chief Judge, in *Kalidas Kevaldas* v. *Nathu Bhagvan* (7 B. 217) in which the observations of Sir R. Garth, Chief Judge, in *Ramsbebuk* v. *Ramlall* (6 Cal., 815) are quoted with approval is an authority directly in point. It has been relied upon by the Calcutta High Court in *Dwarka Nath Mitter* v. *Tara Prosunna Roy* (17 Cal., 160). So that it follows that 1st plaintiff cannot sue alone as he and his brother the 2nd plaintiff are entitled to this debt as members of an undivided Hindu Family and the claim became barred under section 22 of the Limitation when 2nd plaintiff was added as a co-plaintiff. The 1st plaintiff does not appear to be entitled to at least half the amount sued for as he cannot claim in this suit his half share in the joint family property.

In the result the decision of the lower appellate Court must be reversed and the plaintiffs' suit dismissed. But as the defendants have set up a false plea as to the genuineness of the document, they will get no costs from the plaintiffs.

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# APPELLATE CIVIL.

*Before Mr. Justice A. Rangaswami Iyengar and Mr Justice H. V. Nanjundayya.*

THIMMIAH, APPELLANT, (PLAINTIFF) — 1904. October 19.

*v.*

HANUMANTHIA, MINOR BY GUARDIAN RUDRAPPA AND ANOTHER, RESPONDENTS, (DEFENDANTS).*

*Civil Procedure Code, section 448—Minor defendant—Guardian not formally appointed by Court—Ex-parte decree against minor—Court's power to consider the validity of such decree in a subsequent suit.*

In a suit for the transfer of patta of a certain land brought against a minor defendant, summonses were served on the houses of the minor and his guardian, and an ex-parte decree was passed as no one appeared for the defendant. As the survey number of the land was wrongly described in that suit, the plaintiff filed the present suit for correcting the mistake and the minor defendant was represented by another guardian who pleaded that the ex-parte decree passed in the previons suit was invalid. The Munsiff overruled the contention of the defendant and decreed the plaintiff's suit. In appeal, the District Judge reversed the lower Court's decree and dismissed the suit. In Second Appeal, the plaintiff contended that the decree in the previous suit was conclusive.

*Held*, that as the minor could at any time apply to the Court to have the decree set aside as invalid, there was no objection to enquire into the same objection in the present case and therefore the decision of the District Judge that the decree in the previous suit was not valid as against the minor, was correct.

*Dakeshur Pershad Narain Singh* v. *Rewat Mehton, I. L. R*, 24 *Cal.*, 25; *Jatindra Mohan Poddar* v. *Srinath Roy, I. L. R.*, 26 *Cal.*, 267, *referred to.*

SUIT to declare that plaintiff is the owner of a certain land and to direct the defendants to get the patta of the land transferred to plaintiff's name. The Munsiff of Chitaldrug passed a decree in

* Second Appeal No. 82 of 1903-04, against the decree of the District Judge of Shimoga in Appeal No. 127 of 1900-01, reversing the decree of the Court of the Munsiff of Chitaldroog in O. S. No. 682 of 1899-00.

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favour of plaintiff. The District Judge of Shimoga, in appeal, reversed the Munsiff's decree and dismissed the suit.

The plaintiff preferred this Second Appeal.

Messrs. *L. Sreenivasa Iyengar* and *C. S. Doraswami Iyer* for the appellant.

Mr. *R. Gundu Rao* for the 1st respondent.

JUDGMENT.—In O. S. No. 435 of 1891, the present plaintiff and his brother Pala Reddi sued the minor 1st defendant and the plaintiff's brother Hanumantappa for the land in dispute. The minor was represented by the present 2nd defendant Valase Hanumantayya who is his uncle. The plaintiffs and the present 2nd defendant as guardian of the minor effected a compromise, stipulating, among other matters, that, in consideration of the surrender of all rights of the minor in the land, the plaintiffs should pay Rs. 500 to 1st defendant's guardian, that, deducting Rs. 230 already paid, Rs. 270 was paid on the date of compromise to the guardian and that the 1st defendant's guardian should have the patta transferred in the name of the plaintiff.

In O. S. No. 723 of 1893-94 brought by the present plaintiff against the minor 1st defendant and 2nd defendant Valase Hanumantayya as his guardian, the Munsiff of Chitaldroog passed an exparte decree dated 11—5—1894 that defendants shall transfer patta of the land to plaintiff and that 2nd defendant should bear the plaintiff's costs.

The plaintiff then applied to the Revenue Department for transfer of the patta when it was found that a wrong survey number had been given for the land in the decree. The plaintiff therefore filed the present suit for correcting this mistake. The 2nd defendant became exparte and the minor 1st defendant was represented by another guardian who advanced various pleas in defence. The Munsiff allowed the plaintiff's suit. In appeal the learned District Judge of Shimoga held that the decree in O. S. No. 723 of 1893-94 was not valid and dismissed the suit on the ground that it did not appear that the plaintiff had formally applied for the appointment of any one as the guardian of 1st defendant or that any one else was

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made guardian *ad litem* for him when the 2nd defendant failed to attend. The plaintiff has brought this appeal against the District Judge's decision.

The records of O. S. No. 435 of 1891 are not forthcoming and it is not possible to say whether Valase Hanumantayya had been appointed guardian *ad litem* to the minor respondent and whether the deed of compromise was approved by the court. The copy of Razinama is filed as Exhibit A in this suit but it does not show whether any order was passed thereon by the court nor has even the copy of decree or order in that suit been filed. The records of O. S. No. 723 of 1893-94 are available and clearly shew that Valase Hanumantayya was not ordered formally to be made a guardian to the minor under section 443, C. P. C. On proof of service of the summons on the house of the minor and his guardian, the Munsiff decreed the case exparte. The question is whether such a decree can be held to be valid. In *Dakeshur Pershad* v. *Rewat Mehton,* 24 Cal., 25 (1896), a decree passed against a minor under similar circumstances was held to be bad and set aside and the case was remanded for fresh enquiry on the appeal of the minor guardian. In *Jatindra Mohan* v. *Srinath Roy,* 26 Cal., 267 (1898) an exparte decree passed in a case in which one of the defendants was a minor, was set aside and a fresh enquiry was ordered on the application of the certificated guardian for similar reasons. But in the present case the minor defendant has neither applied for setting aside of the exparte decree nor sued to have it cancelled as obtained by fraud. The question therefore arises whether the court is justified in enquiring into the circumstances under which the exparte decree was passed in this case. As the minor could at any time apply to the court to have the decree set aside as invalid, there appears to be no objection to enquire into the same objection in the present case and in this view the decision of the learned District Judge is correct.

But both the parties and the Munsiff appear to have lost sight of the importance of observing the provisions of section 443 of the C. P. C. in prosecuting a suit against a minor and two suits have already been filed on the same subject matter by the plaintiff and as the minor has been permitted to take the objection in the present suit in defence without moving to have a subsisting decree set aside,

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it would be hard to compel the plaintiff to resort to a fresh suit. In the interests of all the parties and to prevent further litigation therefore it seems desirable to set aside the order of the District Judge, declining to order a retrial of the suit and direct that the case be sent back to the court of first instance to enquire into and dispose of the plaintiff's right under the alleged deed of compromise after appointing a proper guardian *ad litem* for the minor defendant. The costs of the parties will abide the final result. It is considered not necessary to refund the appeal stamp.

## APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

1904. November 23.

RAGHUBHUSHANA TEERTHA SREEPADANGALAVAROO BY HIS AGENT NARAYANA CHAR, APPELLANT, (DEFENDANT)

*v.*

A. LAKSHMINARANAPPA, RESPONDENT, (PLAINTIFF).*

*Indian Limitation Act, Schedule II, Art 63—Suit for balance of principal and interest due on a bond—Interest—Cause of action.*

On 18th February 1895 the defendant executed a bond for Rs. 2,000 in favour of plaintiff's assignor in which he had agreed to repay the loan and interest before 11th March 1899. The debt was subsequently discharged by instalments and on 6th May 1898 the plaintiff's assignor prepared a patti which showed a sum of Rs. 386-3-10 as due from the defendant. The bond was assigned over to plaintiff on 4th March 1902 and the present suit was filed on 11th March 1902. The Munsiff decreed the suit and, on appeal, the District Judge having found that the principal had been fully repaid on the date of the patti, modified the decree by awarding only a portion of the suit amount being the interest due under the bond. In Second Appeal, it was contended by the defendant that as the whole of the principal amount had been repaid long before 6th May 1898, the claim for arrears of interest also was time-barred.

*Held,* that as the principal was repaid before the commencement of Vilambi and also as interest was calculated only up to May 1898, the latest date of cause of action for the arrears of interest could not be later than that and therefore the suit was barred under Article 63, Schedule II of the Limitation Act.

* Second Appeal No. 106 of 1903-04 against the decree of the District Judge of Shimoga in Appeal No. 115 of 1902-03, modifying the decree of the Court of the Munsiff of Shimoga in Original Suit No. 790 of 1901-02.

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1904.

RAGHUBHUSHANA TEERTHA SREEPADANGALAVAROO. v. LAKSHMINARANAPPA.

SUIT on bond. The Munsiff of Shimoga passed a decree against the defendant in terms of the plaint. In appeal, the District Judge of Shimoga modified the lower Court's decree.

The defendant preferred this Second Appeal.

Messrs. *B. Nanjundappa* and *S. Ranganna* for the appellant.

JUDGMENT.—The plaintiff sues upon a bond dated 18th February 1895 for balance of principal and interest amounting to Rs. 386-13-10 due as per account patti exhibit II furnished by the plaintiff's assignor to the defendant. This patti is dated 6th May 1898 and shows on one side monies due from the defendant on account of the principal and interest due on bond as well as other transactions and per contra credit of the principal of the bond in 6 instalments and of other items and a balance on the whole of Rs. 327-5-0. As observed by the learned District Judge, there was nothing due on account of the principal of the bond on the date of the patti and the debit on account of interest is only Rs. 119-11-10. He seems to think that, though the present suit was filed on 11th March 1902 or more than 3 years after even the date of the account patti, the claim for interest is in time. He gives no reasons and it is not clear how he formed this conclusion. The bond, stipulates for the payment of interest at 8 annas per cent. per month on the 30th M. D. of each year and for the payment before 30th M. D. of Magha of the year Vilambi without any balance of the principal Rs. 2,000 and the interest of that year, (*viz*, Vilambi). But as the principal was repaid before the commencement of the year Vilambi, there was no interest due for that year, and it cannot be said that the cause of action could be deferred for the arrears of interest in this case till 30th M.D. of Magha of Vilambi or 11th March 1899. The items of interest shown as due after the several instalments of principal were paid are calculated only up to May 1898 and the latest date of cause of action for the arrears of interest cannot be later than that. The interest arrears for Hevilambi are, according to document, payable before the end of that year, the last date of which falls on 23rd March 1898.

The suit is thus, under Article 63, Schedule II, Limitation Regulation II of 1896, barred, having been filed on 11th March 1902, and the decision of the District Judge must be reversed and the plaintiff's suit dismissed with costs throughout.

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## APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

1904. December 7.

THIMIYA, APPELLANT, (DEFENDANT)

*v.*

KAPARTI SUBBAYYA, RESPONDENT, (PLAINTIFF).*

*Hindu Law—Hypothecation of family properties by a Hindu mother—Son's liability for the debt.*

The plaintiff sued the defendant for the recovery of some money by the sale of some immoveable properties which had been hypothecated to him by the defendant's mother and the defendant contended that his mother was not competent to alienate those properties and that they were not liable for the debt due to plaintiff.

*Held*, that as the defendant's mother had no right to the properties and as there was nothing to show that she contracted the debt as guardian of the defendant when a minor or as his agent since, the mere fact that she was allowed to be in possession and management of the property did not empower her to encumber the property and therefore the plaintiff's suit must be dismissed.

SUIT on a hypothecation bond. The Munsiff of Chikaballapur dismissed the suit on the ground that the debt was not binding on the defendant. In appeal, the Sub-Judge reversed the Munsiff's decision and granted a decree for plaintiff against the hypothecated properties.

The defendant preferred this Second Appeal.

Mr. B. *Subbanna* for the appellant.

Mr. M. *Ramachandra Rao* for the respondent.

JUDGMENT.—The plaint deed of hypothecation is one executed by the defendant's mother in her own name without reference to the defendant. Even in the plaint the allegations are merely that it was executed by defendant's "deceased mother who was managing family concerns and who contracted the debt for family use." The defendant's mother had no right to the property and there is

* Second Appeal No. 17 of 1904-05, against the decree of the Sub-Judge of Bangalore, in Appeal No. 71 of 1903-04 reversing the decree of the Court of the Munsiff of Chikballapur in O. S. No. 235 of 1900-01.

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nothing to show that she contracted the debt as guardian of the defendant when a minor or as his agent since. The mere fact that she was allowed to be in possession and management of the property does not imply that she was empowered to encumber the property.

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THIMIYA v. KAPARTI SUBBAYYA.

The view taken by the learned Sub-Judge is therefore wrong and his decision cannot be upheld. It is set aside and that of the learned Munsiff is restored with costs in this and the lower Appellate Court.

## APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

GANGARAM AND SURAJEE Co., BY GANGARAM *bin* MANGANIRAM, APPELLANTS, (PLAINTIFFS)

1904 December 8.

*v.*

BATNI SESHAGIRI ROW AND ANOTHER, RESPONDENTS, (DEFENDANTS NOS. 2 AND 3).*

*Indian Contract Act, section* 251—*Partnership—Agreement to supply funds for the business—Partners' liability for acts done by their co-partner—Agency, presumption of—Acknowledgment—Indian Limitation Act, section* 19.

In a suit for money due on a "hundi" drawn by one co-partner on another, the defence of the co-partners other than the drawer of the "hundi" was that they were not bound by the acts done by their co-partner without their authority. The suit was decreed by the first Court. On appeal, the District Judge reversed the lower court's decree and dismissed the suit on two grounds *viz.* that the plaintiffs had not proved that the money borrowed from them was used for the contract work and that the acknowledgment of plaintiffs' debt made by defendant No. 1 was also not binding on the other defendants.

*Held*, that as the act of drawing the "hundi" had been done in the ordinary course of business by the defendant No. 1 who was in charge of the partnership business for which the defendants Nos. 2 and 3 had agreed to supply funds, the latter were also bound by the transaction.

* Second Appeal No. 133 of 1903-04, against the decree of the District Judge of Shimoga in Appeal No. 110 of 1902-03 reversing the decree of the Munsiff of Shimoga in Original Suit No. 1111 of 1900-01.



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*Held also*, that there being an active partnership in a going concern, the authority of defendant No. 1 as agent to bind the other partners must be presumed as an ordinary rule.

*Premji Ludha* v. *Dossa Doongersey, I. L. R.*, 10 *Bom.*, 358 *referred to.*

SUIT for money due on a "hundi." The Munsiff of Shimoga passed a decree in favour of plaintiffs, but this was reversed in appeal by the District Judge of Shimoga and the suit dismissed.

The plaintiffs preferred this Second Appeal.

Mr. *M. B. Varadaraja Iyengar* for the appellants.

Mr. *S. Ranganna* for the respondents.

JUDGMENT.—The facts as to which there is no dispute in this case are these. The three defendants were partners in certain contract work for the erection of bridges. The defendant No. 1 was in charge of supervising and carrying out the work. The agreement of defendants 2 and 3 was that they should supply him with funds. By a hundi (exhibit C) dated 8th June 1898 for monies supplied to defendant No. 1 by the plaintiffs on partnership account, defendant No. 1 drew on defendant No. 2 for 500 Rs. in favour of plaintiffs for the partnership work. The defendant No. 2 has refused to pay and the plaintiffs have now brought this suit. The original court decreed the plaintiff's suit. The learned District Judge of Shimoga has dismissed the suit on appeal by the 2nd and 3rd defendants. The reasons for his decision were that there was nothing to prove the entries in the statement of account exhibit D, on which exhibit C was drawn, that it is difficult to make out that the payments were made on account of the business of the firm, this being especially the case with regard to an item of 200, that plaintiffs failed to prove their allegations in the plaint that they advanced monies to defendant No. 1 at the request of all the defendants, and that no implied authority to defendant No. 1 from defendants Nos. 2 and 3 to acknowledge this liability can be presumed.

The defendant No. 1 being in charge of the partnership works, and the other defendants having agreed to supply him with funds, it was, in the ordinary course of business, that defendant No. 1 should draw upon defendant No. 2 for funds by means of a bill or

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hundi, (section 251 illus: (a) Contract Act 1872), and in the absence of notice to plaintiffs that defendant No. 1 was not empowered to obtain cash from plaintiffs by a hundi on defendant No. 2, the plaintiffs are not bound (exception to section 251 of the Act). So far from there being such notice, defendant No. 2 admits in his evidence that on one occasion defendant No. 1 got money from the plaintiffs and defendant No. 2 paid off that money. Defendant No. 3 admits in his evidence that hundis used to be drawn on partnership account, that he used to receive payments on account of the work, did so to the value of about 30,000 Rs., and that defendant No. 1 and the gumastha used to make payments. Neither of these defendants has denied that the monies given by the plaintiffs were given for and used on the contract work. The loans made by plaintiffs purported to have been given on account of the contract work to defendant No. 1, and there is no denial in the written statement of the appellants or in the evidence that they were so given. There being an active partnership in a going concern, the authority of defendant No. 1 as agent to bind the other partners must be presumed as an ordinary rule (section 19 Exp: 2 Limitation Act; Indian Law Reports 10 Bom., p. 358). The decree of the Original Court is restored with costs of both Appellate Courts against defendants 2 and 3.

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## APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

NARANAPPA, APPELLANT, (PLAINTIFF).

1904. December 15.

*v.*

LINGAMMA AND ANOTHER, RESPONDENTS, (DEFENDANTS).*

*Specific Relief Act, sections 9,42—Declaratory suit—Suit for declaration of title and confirmation of possession—"Consequential relief"—Maintainability—Gift when passing title—Hindu Law.*

The first defendant obtained a decree for possession under section 9 of the Specific Relief Act against the plaintiff who was in possession of the suit

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* Second Appeal No. 118 of 1903-04 against the decree of the Sub-Judge of Mysore in Appeal No 36 of 1903-04 confirming the decree of the Munsiff of Seringapatam in Original Suit No. 1302 of 1900-1901.

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land. Subsequently before the decree was executed by the first defendant, the plaintiff brought a suit against her for a declaration of his title to the suit land and for confirmation of his possession of the same. The 1st defendant contended among other things that the suit being merely for a declaration was not maintainable. The lower Appellate Court upheld the contention and refused to give plaintiff an opportunity to amend the plaint. In Second Appeal,

*Held*, that there was nothing in the terms of section 9 of the Specific Relief Act which required that a prayer to recover possession should be attached to a prayer for establishment of title if the plaintiff was already in physical possession.

*Held further*, that the plaintiff's prayer for a decree that his possession may not be disturbed amounted to a prayer for an order in the nature of an injunction, a prayer for consequential relief under section 42 of the Specific Relief Act.

*Held also*, that in order to complete a gift and make it valid such that the donee would acquire a title which he could convey, it was necessary that the donor should have done all that she could to complete the gift and that since the 1st defendant did not give the donee possession and withdrew her gifts subsequently, the gift was intentionally never completed by the 1st defendant and therefore it passed no title.

SUIT for declaration. The Munsiff of Seringapatam dismissed the suit and this decision was confirmed in appeal by the Sub-Judge of Mysore.

The plaintiff preferred this Second Appeal.

Mr. *S. Narayana Rao* for the appellant.

Messrs. *B. Nanjundappa* and *S. Ranganna* for the respondents.

JUDGMENT.—The plaintiff in this case has sued for declaration of his title in respect of the two acres in suit and for a decree to provide that his possession thereof should not be disturbed. The plaintiff in his plaint has alleged that the owner defendant No. 1 gave the land in suit to Kapadi Raje Urs by transferring its varg on the 12th May 1893; that Kapadi Raje Urs gave it to plaintiff by transferring its varg to plaintiff the next day and since then the plaintiff has been in possession; that defendant No. 1 has obtained a decree under Section 9, Specific Relief Act, 1877, for her restoration to possession, but has not executed it; that plaintiff is still in possession and that defendant No. 2 claims under defendant No. 1. The original court

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dismissed the plaintiff's suit, holding that neither Kapadi Raje Urs nor the plaintiff had acquired title. The plaintiff appealed to the Subordinate Judge of Mysore.

The learned Subordinate Judge held that, by the terms of para 2, Section 9 of the Specific Relief Act, the plaintiff is bound to bring a suit to establish his title to the land in suit and to recover possession thereof when defendant No. 1 has a decree for possession and the possession of plaintiff has been declared merely that of a trespasser; that the suit is for a mere declaratory decree when consequential relief could have been but is not prayed for; and the learned Subordinate Judge refused to allow amendment of the plaint; dismissed the appeal without going into the merits. Against this decision the plaintiff has appealed.

The grounds on which the learned Subordinate Judge has dismissed the appeal do not appear to be valid or sufficient. Although the plaintiff has been adjudged in possession as a trespasser, yet when he seeks a declaration that he is in possession not as a trespasser but as owner, then, if he gets the decree he seeks though merely declaratory, this will convert his possession as trespasser into valid possession and the plaintiff seeks no other possession. There is nothing in the terms of section 9 of the Specific Relief Act which requires that a prayer to recover possession should be attached to a prayer for establishment of title, if the plaintiff is still in physical possession. The plaintiff has, as a matter of fact, prayed for a decree that his possession may not be disturbed. This is a prayer for an order in the nature of an injunction, a prayer for consequential relief under section 42 of the Act, and even if there were no such prayer, the suit should not have been dismissed, but an opportunity to make amendment should have been allowed to the plaintiff (*Kunj Bihari Prasadji* v. *Keshavlal* and others, I. L. R. 28 Bom. 567).

We find, however, no necessity to remand the appeal to the first Appellate Court for a finding on the merits, as we consider that there is another ground apparent on which the plaintiff's suit and appeal should be held rightly dismissed. This is that the plaintiff has failed to prove the title of which he seeks a declaration. In the plaint, as already noticed, the plaintiff has alleged that Kapadi Raje

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Urs gave him the land on the 13th May 1893 by transferring its varg, that is the liability for payment of the Government Revenue to plaintiff, and that plaintiff has ever since been in possession. In his deposition in this suit, the plaintiff gave an entirely different account. The plaintiff has deposed that Kapadi Raje Urs died without defendant No. 1 giving him possession; and that defendant No. 1 delivered possession to plaintiff by order of the Deputy Commissioner who was inquiring into the affairs of Kapadi Raje Urs in 1899. He has deposed that defendant No. 1 made an agreement in 1888-9 to sell to Kapadi Raje Urs and received consideration in cash; and that Kapadi Raje Urs sold the land in suit to plaintiff with 22 acres of other land for 6,000 Rs. which he had borrowed from the plaintiff.

There can be no doubt that this case set up by the plaintiff in his evidence is entirely false. The plaintiff has adduced no evidence to corroborate his statement that he purchased the land from Kapadi Raje Urs or that the latter was indebted to him. The statement is entirely inconsistent with the statement of claim set forth in the plaint. The sale alleged to have been made to plaintiff by Kapadi Raje Urs is not referred to in the varg rajinama (Exhibit B) executed by him in plaintiff's favour. If the plaintiff bought the land, it is not credible that he would have remained out of possession for six years without attempting to recover possession till the Deputy Commissioner told defendant No. 1 to give possession to him. We do not believe that defendant No. 1 ever gave possession to the plaintiff. The statement of defendant No. 1 is that she executed the varg rajinama in favour of Kapadi Raje Urs, because four or five years after a water channel had been opened to her village, he asked for some land as a reward for his trouble in causing it to be brought, and as a means of feeding the poor; that afterwards coming to know that the channel had been opened without his intervention, she, like other raiyots, withdrew her rajinama; and that she never gave up possession or ceased paying the Revenue for the land. In order to complete her gift to Kapadi Raje Urs and make it a valid gift, such that he would acquire a title which he could convey, it was necessary that defendant No. 1, his donor, should have done all she could to complete the gift. (*Joitaram Ramkrishna* v. *Ramkrishna Nandlal* and another. I. L. R. XXVII Bom. p. 31).

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Since she did not give him possession and withdrew her gift subsequently, it is plain that the gift was intentionally never completed by her and passed no title; and that the plaintiff obtained none from the donee Kapadi Raje Urs. So, taking the case set forth in the plaint in the present suit as the plaintiff's case, he acquired no title.

It has, however, been urged that the plaintiff should have been allowed to prove that defendant No. 1 in or about 1888 or 1889 executed with other raiyats a deed of sale of the land in suit, the other raiyats selling other lands in favour of Kapadi Raje Urs for consideration and that the Original Court erred in refusing to issue a summons to Nanjunda Raje Urs, administering the estate of Kapadi Raje Urs, to produce that sale deed. The record shows, however, that though the plaintiff applied for a summons to Nanjunda Raje Urs, there was no summons for him to produce such a sale deed and the plaintiff's advocate closed his case without examining Nanjunda Raje Urs and without stating that his evidence was necessary to prove the alleged sale deed. No such sale deed was set forth in the plaint as a source of plaintiff's title and no such deed was proved.

The result is that we hold on the evidence that the plaintiff has failed to make out a title. The appeal is dismissed with costs.

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## APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice H. V. Nanjundayya.*

C. BASAPPA, APPELLANT, (PLAINTIFF).

*v.*

SOMANNA AND 2 OTHERS, RESPONDENTS, (DEFENDANTS).

1904. October 24.

*Malicious prosecution—Information to the Police—Prosecution by Police—Discharge of accused—Defamation—Suit for damages for loss of business and reputation against informant—Maintainability.*

The defendants gave some information to the Police regarding plaintiff and thereupon the Police searched the house of the plaintiff and prosecuted him for theft before the Assistant Commissioner and 1st Class Magistrate of

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* Regular Appeal No. 219 of 1903-04 against the decree of the Sub-Judge of Chitaldrug in Original Suit No. 435 of 1902-03.

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Davangere Sub-Division. The Magistrate held an enquiry and discharged the plaintiff. The plaintiff subsequently brought this suit for recovery of damages from the defendants for loss of business and reputation suffered by him. The lower Court dismissed the suit on the ground that the defendants were not responsible for the acts done by the Police.

*Held*, Per Justice NANJUNDAYYA, that the plaintiff in a case like the present one, could maintain an action for defamation of character and all the consequences that followed the complaint to the Police would have to be considered in determining the nature and extent of the liability of the defendants.

Per Justice STALEY, Chief Judge, the plaintiff had a right to sue for damages in the present case.

*Narasinga Row, v. Muthaya Pillai, I. L. R.,* 26 *Mad.*, 362;

*Raghavendra v. Kashinath Bhat, I.L.R.,* 19 *Bom.* 717; *referred to.*

SUIT for damages. The Sub-Judge of Chitaldrug dismissed the suit

The plaintiff preferred this Regular Appeal.

Messrs. *D. Venkataramayya* and *M. Ramachandra Rao* for the appellant.

Mr. *B. Nagappa* for the respondents.

JUDGMENT.—Mr. Justice H. V. NANJUNDAYYA.—The plaintiff has based his suit on the allegations that the defendants gave information to the Police that a theft after house-breaking had taken place in their house, and that they suspected the accused, their neighbour, to have committed the offence, that they concocted evidence in support of it, and that, as a result, his house was searched, and he was himself taken into custody and placed before a Magistrate, by whom he was discharged under section 253 of the Procedure Code. He claims 4,000 Rs. as damages, 3,000 Rs. for loss of reputation, 500 Rs. for fees, etc. to pleaders, 100 Rs. for *Prayaschitta,* and 400 Rs. for loss of business profits.

The District Judge of Shimoga before whom the suit was filed, framed issues, and adjourned the case for the poduction of evidence. The objection on which the Sub-Judge has disposed of the suit, was neither taken by the defendants, nor put in issue by the District Judge. The question is whether, to sustain a suit for malicious prosecution, it is necessary that the complaint should have been

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lodged directly before the Magistrate by the defendant; in other words, is not the complaint to the Police itself sufficient act of prosecution for rendering the defendant liable in damages, if the other ingredients required to give the plaintiff a right to recover, can be proved to exist?

There is little direct authority on the point, except two cases of the Madras High Court, one of which (*Narasinga Row* v. *Muthaya Pillai*) I. L. R. 26, Mad. 362, is quoted and followed by the Subordinate Judge, and the other was quoted in the course of the argument before us. The Judgment is brief and goes on the ground that the Police and not the defendant were responsible for the proceedings taken before the Magistrate. But the question whether the initiation of proceedings before the Police themselves would render the defendant liable for false prosecution, was neither raised nor considered.

The term 'malicious prosecution' in connection with civil suits is used as far as I know, only in the Limitation Act, which, without defining or describing it, lays down a period of one year running from the date 'when the plaintiff is acquitted or the prosecution is otherwise terminated' (Art. 23). A form of plaint for malicious prosecution is given as No. 93 in the 4th schedule of the Civil Procedure Code; but this also gives no indication of the exact scope of the suit, and whether it has to be established that the prosecution should have been directly launched before a Magistrate.

The whole tendency of Indian Law has been to discourage mere technicalities of pleading and to look to the substance of the dispute in determining the merits of a case. It is difficult to distinguish between the evil consequences to the plaintiff, when the complaint is lodged before a Magistrate and when it is begun by information to the Police. Both the ways of initiating criminal proceedings are sanctioned by the Criminal Procedure Code. In case the prosecution is false and malicious, the damage and inconvenience resulting to the plaintiff is exactly the same either way. The Police may believe or disbelieve the evidence produced in course of their investigation, and the Magistrate does the same. They exercise a semi-judicial discretion. This may be enough to show that



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the defendant is not primarily responsible for the case going before a Magistrate. But all the proceedings of the Police due to the information given by the defendant. Moreover, they are also empowered to arrest the accused and detain him in custody and to search his house, and otherwise subject him to dis-comfort and disgrace. Why should the plaintiff have an action when a Magistrate on complaint directs these things, and not have one when the Police to whom the law gives certain powers are moved by the malicious complaint of the defendant to do acts resulting in exactly similar damage to the plaintiff?

A prosecution is described as a proceeding either by way of indictment or information, in the Criminal Courts in order to put an offender upon his trial (Wharton's Law Lexicon). An information to the Police is one of the ways in which the Criminal Law allows a matter to be brought before the Courts. In a recent book which is evidently a careful compilation from the best authorities, the definition of malicious prosecution is given in the following words: 'Malicious prosecution consists in the malicious institution against another, of criminal, or bankruptcy or liquidation proceedings without reasonable or probable cause.' (Underhill on Torts). The inclusion of the last two heads in the English Law shows that a complaint to a Magistrate is not a *sine qua non* for an action for malicious prosecution. The case of *Quartz Hill Gold Mining Company* v. *Eyre,* (Law Reports English, 11 Q. B. D. 1883 p. 674) seems to be the latest case, showing that an action lies for falsely and maliciously and without reasonable and probable cause, presenting a petition to wind up a Company. In answer to the argument which the Sub-Judge has stated (amplifying the reason given by the Madras High Court) that the arrest of the plaintiff and his subsequent prosecution are judicial and not merely ministerial acts of the Police, the observations of Brett, M. R. may be aptly quoted:—

"In *Johnson* v. *Emerson* (Law Reports 6 Ex. 329 at pp. 372, 373, 379, 380) it was suggested by Martin, B, that under the present law as to bankruptcy an action could not be maintained for falsely and maliciously and without reasonable or probable cause procuring an adjudication in bankruptcy, because under the Bankruptcy Act, 1869, the proceedings commenced by a petition for adjudication of which the alleged insolvent may get rid, and upon which the Court

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is to act, and the adjudication will not be made unless the Court is advised that the petition is well founded, and further, because a wrongful adjudication can be obtained only by an erroneous decision of the Court, and a party to the proceedings cannot be held liable for the erroneous decision of the Court unless he has procured it by fraud and perjury, for which he may be held criminally responsible and accordingly punished. This is in substance the view suggested by Martin, B., but it was not adopted by the other Judges of the Court of Exchequer, and I think that it cannot be maintained. The fault of the proposition involved in this view is that it is too large. The proposition is that an action cannot be maintained because the petitioning creditor merely asks the Court to act judicially, and because it was to be assumed that the Court would decide rightly. If that proposition were well founded, it would be an answer to an action for malicious prosecution on a criminal charge, because even in that case the prosecutor merely asks the tribunal to decide upon the guilt of the person whom he charges. If a man is summoned before a justice of the peace falsely and maliciously and without reasonable or probable cause, he will be put to expense in defending himself, and his fair fame may suffer from the accusation. Nevertheless, the prosecutor only asks the justice to adjudicate upon the charge. Therefore it is not a good answer to an action for maliciously procuring an adjudication in bankruptcy to say, that the alleged creditor has only asked for a judicial decision. It seems to me that an action can be maintained for maliciously procuring an adjudication under the Bankruptcy Act, 1869, because by the petition, which is the first process, the cridit of the person against whom it is presented is injured before he can show that the accusation made against him is false; he is injured in his fair fame, even although he does not suffer a pecuniary loss—" (pp. 683 and 684).

The following remarks of Bowen L. J. are also very opposite to this case :— (pp. 691, 692 and 693).

" But although an action does not give rise to an action for malicious prosecution, inasmuch as it does not necessarily or naturally involve damage, there are legal proceedings which do necessarily

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and naturally involve that damage; and when proceedings of that kind have been taken fasely and maliciously, and without reasonable or probable cause, then, inasmuch as an injury has been done, the law gives a remedy. Such proceedings are indictments—I do not say every indictment, but I mean all indictments involving either scandal to reputation or the possible loss of liberty to the person, that is, all ordinary indictments for ordinary offences. In its very nature the presentation or the prosecution of an indictment involves damage, which cannot be afterwards repaired by the failure of the proceedings, to the fair fame of the person assailed, and for that reason, as it seems to me, the law considers that to present and prosecute an indictment falsely and without reasonable or probable cause, is a foundation for a subsequent action for a malicious prosecution.

"But there are other proceedings which necessarily involve damage, such as the presentation of a bankruptcy petition against a trader. In the past, when a trader's property was touched by making him a bankrupt in the first instance, and he was left to get rid of the misfortune as best he could, of course he suffered a direct injury as to his property. But a trader's credit seems to me to be as valuable as his property, and the present proceedings in bankruptcy, although they are dis-similar to proceedings in bankruptcy under former Acts, resemble them in this, that they strike home at a man's credit, and therefore I think the view of those judges correct who held, in *Johnson* v. *Emerson*, Law Reports 6 Ex. 329, that the false and malicious presentation, without reasonable and probable cause, of a bankruptcy petition against a trader, under the Bankruptcy Act, 1869, gave rise to an action for malicious prosecution . . . . . . . . . I think that the action will lie, for the reason that special damage is involved in the very institution of the proceedings (which ex-hypothesi are unjust and without reasonable or probable cause) for the purpose of winding up a going company."

It seems to me quite immaterial whether the defendant complained to the Police or directly to the Magistrate. The object of both is the same, and the complainant knows that it is the same, namely, to subject the plaintiff to a trial on a criminal charge. The liability of the defendant cannot therefore, be different. I would,

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therefore, reverse the decree of the Sub-Judge and direct that the suit be fully tried and disposed of on its merits.

Even supposing that a prosecution launched originally before a Magistrate should be held to be a necessary condition to sustain an action for malicious prosecution, there is no doubt whatever that the plaintiff in such a case as the present can maintain an action for defamation of character. All the consequences that followed the complaint to the Police will have to be considered in determining the nature and extent of the liability of the defendants. The plaintiff has alleged the facts on which he relies, without giving any technical name for his suit. The order of the Subordinate Judge, dismissing the suit, cannot, therefore, be supported. The decree is set aside and the case remanded for further hearing and determination on merits. The Court fee on the Memo. of Appeal will be refunded; and the other costs of this appeal will be costs in the suit.

THE CHIEF JUDGE:—The term 'prosecution' as the authorities referred to by my learned colleague themselves show is, in legal phraseology, confined to proceedings instituted in a Court.

The plaintiff, however, in the present suit alleges that a false and malicious information was laid to the Police against him, that evidence was concocted in support of it, and that damage was thereby caused to plaintiff in business and reputation. The plaintiff, therefore, certainly has a right of suit for damages as in a suit for defamation. The point has been fully discussed by the Bombay High Court in their judgment in the case *Raghavendra* v. *Kashinath Bhat* (I. L. R. XIX Bom. p. 717). I therefore agree with my learned colleague in the order of remand.

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## APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice A. E. Staley, Chief Judge, Mr. Justice A. Rangaswami Iyengar and Mr. Justice H. V. Nanjundayya.*

1904. August 30, November 9.

CHICK MARIAMMA AND 3 OTHERS, APPELLANTS, (DEFENDANTS)

*v.*

VENCATASAMAPPA, RESPONDENT, (PLAINTIFF).*

*Hindu Law—Alienation by a Hindu wife—Husband becoming an ascetic and leaving property in possession of wife—Adverse possession of wife for twelve years—Binding character of such alienation as regards husband and his alienees—Limitation.*

Some properties which had been hypothecated to plaintiff by a Hindu wife (defendant No. 1) were subsequently gifted away by her husband (defendant No. 2) to other persons. In a suit on the hypothecation bond, the plaintiff alleged that as defendant No. 2 had long ago become a religious ascetic, his wife, (defendant No. 1) had become the sole owner of the properties and that the debt was binding on defendant No. 2 and his donees. The defendants Nos. 2, 3 and 4 contended that defendant No. 1 had no right to hypothecate the properties and that the debt was not binding on them.

*Held*, (Justice NANJUNDAYYA, dissenting), that as defendant No. 2 renounced the world and lived as an ascetic leaving his wife (defendant No. 1) as the ostensible and unquestioned owner of his rights to his properties, her adverse possession for 12 years from about 1887 was sufficient to give her a title and to forfeit that of defendant No. 2, under the ordinary rule as to title by prescription.

SUIT on a hypthecation bond. The Additional Munsiff of Bangalore passed a decree directing the plaintiff to recover the suit amount from the hypothecated properties and from the 1st defendant and the costs from defendants Nos. 2, 3 and 4.

The defendants preferred this Regular Appeal.

Mr. *S. Narayana Rao* for the appellants.

Messrs. *L. Sreenivasa Iyengar* and *C. S. Dooraswami Iyer for the respondent.*

* Regular Appeal No. 201 of 1903-04 against the decree of the Additional Munsiff of Bangalore in Original Suit No. 887 of 1901-02.

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This Regular Appeal first came on for hearing before a Bench consisting of Mr. Justice A. Rangaswami Iyengar and Mr. Justice H. V. Nanjundayya who delivered the following judgment:—

Mr. Justice H. V. NANJUNDAYYA.—The first issue raised in this case is, whether the suit bond is genuine and executed for consideration. There are a few minor discrepancies between the witnesses who speak of the matter; but they are unimportant and may be explained by the fact of the transaction having taken place some six or seven years previously. The Munsiff's finding in favour of the plaintiff is correct and must be supported.

The next question is, whether the interest of the second and other defendants in the property mortgaged under exhibit A is affected by this transaction. It is said by the plaintiff that the second defendant, who is the first defendant's husband, became a recluse and resigned all his interest many years ago and that the first defendant has been dealing with the property independently of him. It is conceded that all the mortgaged property, is the share due to him out of his ancestral property which was divided between his brothers and the first defendant at a partition. The plaintiff produced a memorandum of this partition but it has not been filed in the case as an exhibit apparently as it is unstamped and unregistered. We are, therefore, precluded from referring to its terms, though it is mentioned in exhibit A as having been handed over to the plaintiff. There is no evidence produced to show exactly what is meant by a recluse and to what exact degree or in what manner the second defendant can be regarded as having retired from temporal concerns. In 1889, the first defendant filed a suit independently of him against two strangers for trespass on land which she claimed through him and obtained a decree (C), this particular question of her authority not being raised therein. In her deposition in that case, she stated that the land was her share; and in this case, she says about it that her husband said, he did not want the properties to which the suit related and that it was therefore filed by her. There is nothing in the record either of this case or of that one that the husband was aware of her independent dealings and either actively or passively acquiesced therein. From the mere fact of his non-intervention, it

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cannot be inferred that he had resigned all his rights in her favour and as there was nothing adverse to his interests in the steps she took to protect them, it cannot be a fair deduction that he did so. A person can be held to have lost his civil rights only, if it is shown that he has resigned them or conveyed them away by some voluntary and legally efficacious act of his, or lost them by some other's adverse possession and enjoyment for the statutory period of limitation. There is absolutely no evidence on these points.

There is another alternative. He may be estopped by his conduct from asserting his legal rights against a particular party. It is not pretended that he made any active representation in the matter of this mortgage to the plaintiff, amounting to an acquiescence in the act of his wife. She does not profess to act on his behalf or under his authority. One of the witnesses says that she represented herself to be a widow at the time of entering into this transaction. The plaintiff, however, knew that her husband was alive. The most natural and certainly the only prudent course for him was to ascertain directly from this person whether he had authorized his wife to deal with the property. Not having done so, he has no right to say that he was misled, and can get only what the first defendant could legally convey.

It was suggested that, as the 2nd defendant did not care to appear personally before the Court to deny the plaintiff's allegations and prove his title, it is to be presumed that his wife had power to dispose of the property. He was not asked to appear personally; and when it is said that he has lost his rights by an act of another person, the burden of proof lies on the plaintiff, even though this other person happens to be his wife. The plaintiff having failed to discharge it, he is not entitled to obtain a decree against him. The same conclusion applies to the 3rd and 4th defendants.

The decree will therefore be modified so as to exonerate the property mentioned in Schedule A, and to make the amount sued for, recoverable only from the 1st defendant and her property, the items mentioned in Schedule B for the purchase of which, her own money seems to have been applied being also made liable.

No costs will be allowed to either party.

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Mr. Justice A. RANGASWAMI IYENGAR :—As regards the question whether the plaintiff can succeed in his suit against 2nd defendant:—

The plaintiff, examined as his 1st witness, has deposed that "her (1st defendant's) husband, the 2nd defendant, renounced the world about 30 years ago. She got some lands for her share." . . . . . . "There was a partition between Vencataramanappa, Gurappa, Lingappa and her." "All of them fell to the 1st defendant's share in 1887. The latter (Dodda Mariamma) obtained a decree for Rs. 600 and odd. The 1st defendant's share of that debt was Rs. 156 and odd. That was discharged out of the money lent by me." "Her husband is alive . . . . The properties hypothecated to me fell to the share of the 1st defendant at the partition between her and her brothers-in-law . . . . The properties were given to her *for her* husband . . . . The second defendant had become a recluse 10 or 12 years before the partition . . . I have made 2nd defendant as a party to this suit because he was made to execute deeds of gift in favour of 3rd and 4th defendants . . . ." "Dodda Mariamma did not include the first defendant's husband as a party to her suit as he was a recluse."

The plaintiff's 4th witness is the husband of the 3rd defendant and 1st defendant, his mother-in-law, is also related to him as his uncle's daughter. He had deposed "Her husband became a recluse about 20 years ago." In the Canarese deposition he has deposed that "he went away wearing the red cloth and carrying Kamandala (vessel of a Sannyasi), that is, he resigned the family and house and property." "I do not know where he is now" . . . . "The second defendant's properties are in 1st defendant's possession.". . . . "My father-in-law is not in caste." "The 2nd defendant is not there (at Samanthanahalli) now."

The plaintiff's 8th witness is the Shanbhogue of Samantanahalli and says that, "The ancestral properties were divided between the 1st defendant, Appanna and Guruva, more than 10 or 12 years ago. The 1st defendant's husband has become a recluse and was living separately. The 1st defendant was living in her father-in-law's house." In the Canarese deposition, he has further explained that the 2nd defendant "had assumed 'Vyragya' *i. e.* growing a beard and wearing red cloth."



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The 1st defendant examined as plaintiff's 9th witness has deposed "I had filed a suit against Linga and Muniyella Reddi in the Munsiff's Court. . . . My husband said that he did not want the properties to which the suit related and it was therefore filed by me. I did not state in it that he had taken kavi cloth and become a recluse. I do not know anything about the partition between him and his brothers." "My sister filed a suit against me for Rs. 500. My husband had taken Rs. 100 from her. He was not a party to that suit. His brothers were parties to it" . . .

In exhibit C which is the judgment in O. S. No. 249 of 1889, the first para in the substance of the plaint is that "the lands mentioned in the schedule came to the share of the plaintiff's husband Muni Reddy and were in the possession and enjoyment of plaintiff," and the last para recites "The plaintiff has instituted this suit as her husband Muni Reddi has become a recluse and lives elsewhere abandoning the suit properties and his (civil) rights and he has also no male issue." The word used in the plaint is *Viraktanagi*, *i. e*, having become indifferent (to the world).

Thus, we have the oral evidence of witnesses to say that the second defendant became indifferent to the world and left his house assuming the garb of a Sanyasi about 30 years ago, that about 10 or 12 years after that, the family property was divided between his brothers and his wife, the first defendant, that, in 1889, 1st defendant sued for some of the lands, alleging that her husband had resigned his rights and gone away and that she was in possession and enjoyment of his property, that the second defendant was not party to a suit, which 1st defendant's sister had instituted against 1st defendant and second defendant's brothers for money which she had lent 2nd defendant

This evidence is not rebutted by the examination of any witnesses on the other side. The records do not show that the 2nd defendant ever put in his appearance in this case. He has not chosen to come forward and deny the statements made on behalf of the plaintiff. Neither he nor the 3rd and 4th defendants who are the donees of the property from him have taken any steps to contest the suit. Beyond signing the vakalat along with 1st defendant, they do not appear to have done anything to assert their rights. At the

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last hearing of the case, it is the 1st defendant that "prays for an adjournment as her witnesses have not come."

I think the evidence detailed above, is sufficient to show that the 2nd defendant has become a religious ascetic after resigning his rights to his land. Even if it be argued that he has not renounced the world and entered the sanyasi order in due religious form, there is enough to shew that he gave up his property and went away and that 1st defendant has been in sole possession and management of the property, in her own right and not as agent or representative of the 2nd defendant for about 15 or 16 years, long enough to bar his rights in the property. He is either estopped from now setting up a claim to the property, or his rights, if any, have become barred by Law of Limitation. A gift made by him recently and in order to defeat alienations by the 1st defendant cannot deprive the alienees of their rights.

In another view also, the plaintiff should be considered entitled to succeed. Even though the second defendant may not be civilly dead, it cannot be denied that the 2nd defendant left the 1st defendant to manage the property and support the family. In the course of such management she bought property and for payment of a part of the purchase money and other debts, she mortgaged the family property. It is not contended that her management was improper or ruinous to the family or that the plaintiff's transaction is not a fair one. It must therefore be binding on the 2nd defendant and others who claim under him.

In either view, I am of opinion that the decision of the Munsiff must be confirmed and this appeal dismissed with costs.

Owing to the difference of opinion between their Honors, Mr. Justice A. Rangaswami Iyengar referred the case to the Full Bench for the decision of the following questions :—

(1). Whether the 2nd defendant has lost his rights in the family property or whether he is estopped or barred from setting up his claim to the same?

(2). Whether the mortgage by the 1st defendant is binding on the 2nd defendant and his donees under the deeds of gift executed by him?

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This appeal then came on for hearing before the Full Bench constituted as above.

THE CHIEF JUDGE.—The two questions referred for consideration of the Full Bench are—

(1). Whether the 2nd defendant has lost his rights in the family property or whether he is estopped or barred from setting up his claim to the same?

(2). Whether the mortgage by the 1st defendant is binding on the 2nd defendant and his donees under the deeds of gift executed by him?

It is urged that the second defendant has lost his legal title to his property by becoming an ascetic and renouncing as such the world and his worldly possessions. My learned collegue Mr. Justice Rangasami Iyengar has, I think, sufficiently demonstrated by the evidence that he did become an ascetic and make such renunciation. We have further had the benefit of hearing the evidence of defendant No. 2 himself. He has admitted that he knew of her suit in 1889 against their son-in-law and the latter's brother (in which she alleged that her husband was 'aviratha' *i. e.* Vairagi, had given up the lands then in a suit of which she was in possession); and stated that she filed that suit though he told her not to do so. To my mind it is impossible to believe that if the allegation in that plaint were not true, the present defendant No. 2 and the defendants in that suit would have allowed her claim to remain unchallenged, as they have done till now.

But that the effect of defendant No. 2 becoming an ascetic and renouncing the world and worldly possessions was to pass the legal title in the latter to his next heir at once. I think it is no. [illegible]roved. The defendant No. 2 is a Sudra. In order to make out such case, the plaintiff was bound to prove (for the reasons given in the case of *Dharmapuram Pandara Sannadhi* v. *Virapandiyam Pillai,* 22 Mad., p. 302) what was the special usage applicable to the devolution of property of a Sudra becoming ascetic? He has not done so. We do not know if such special usage exists or how far, if there is any, it would apply to defendant No. 2, or would pass the legal title in his property to his wife.

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But I think the evidence noticed by Mr. Justice Rangasami Iyengar does establish that, from about 1877, the defendant No. 2 renounced the world, lived as an ascetic, leaving his wife as the ostensible and unquestioned owner of his rights to his properties as though such special usage existed. Her adverse possession, *i. e.* her possession as under a title adverse to and inconsistent with her husband's title for 12 years from about 1877, was sufficient to give her title, and to forfeit that of defendant No. 2, under the ordinary rule as to title by prescription.

No question of estoppel as against defendant No. 2 has been raised in the pleadings put in issue or decided, nor has the evidence been directed to such question. I think, therefore, that since the appeal should be dismissed on the ground last stated and the question of estoppel could only be settled by a remand, that this Court should not enter on it. On the same ground it follows, that it should be held that the mortgage by the defendant No. 1 is binding on the defendant No. 2 and his donees under the deeds of gift executed by him.

I therefore think that the appeal should be dismissed with costs.

Mr. Justice A. RANGASWAMI IYENGAR :—I agree.

Mr. Justice H. V. NANJUNDAYYA :—I regret I see no sufficient reason to alter my previous judgment.

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## APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

1904. November 26.

SUBBAROYAPPA, APPELLANT, (DEFENDANT)

*v.*

TATAPARTHAPPA, RESPONDENT, (PLAINTIFF).*

*Indian Limitation Act, Sections* 5, 12, *Schedule II, Article* 158—*Arbitration—Award—Application to set aside award—Exclusion of time necessary for obtaining copy of award—"Misconduct" of arbitrators—Civil Procedure Code, section* 521 *clause (a)*

In a suit for money some persons were appointed as arbitrators who submitted an award to the Court on 22nd December, 1902. The Court was closed for holidays from 24th December 1902 to 8th January 1903. On the reopening day, *i. e.* 9th January, the defendant applied for a copy of the award and filed his objections on the 10th idem. The Munsiff passed a decree in terms of the award. In appeal, the questions for consideration were, whether the defendant's application to set aside the award was made within the time prescribed by law and whether the arbitrators were not guilty of misconduct within the meaning of section 521, clause (a) of the Civil Procedure Code.

*Held*, that as the copy of the award had been applied for on the day the court reopened after holidays and obtained the next day, the appellant (defendant) was entitled to add the time taken for obtaining the copy and therefore his application for setting aside the award was in time.

*Siyadat-un-nissa* v. *Muhammad Mahmud, I. L. R.*, 19 *All.*, 342 *followed.*

*Held further*, that the conduct of the arbitrators in refusing to hear the defendant's witnesses, when tendered by him, was 'misconduct,' within the meaning of section 521 (a), Civil Procedure Code.

SUIT for money. The Munsiff of Chikaballapur granted a decree to plaintiff in terms of the award which had been passed by the arbitrators appointed in the case.

The defendant preferred this Regular Appeal

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* Regular Appeal No. 94 of 1903-04 against the decree of the Munsiff of Chikaballapur in Original Suit No. 556 of 1901-02.

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SUBBA-ROYAPPA *v.* TATAPAR-THAPPA.

Mr. *C. V. Narasimha Iyengar* for the appellant.

Mr. *K. T. Narasimha Iyengar* for the respondent.

ORDER.—This is an appeal against a decree, affirming an award of arbitrator in a suit for money due by the defendant to plaintiff. The first question for consideration is, whether the application of the defendant to set aside the award of the arbitrators was made within the time of limitation prescribed by Article 158 of the Limitation Regulation, 1896.

The award was submitted to the Court on the 22nd December 1902. The appellant-defendant's pleader applied for time to take a copy and file objections. The Court allowed him time to the 10th January 1903. From the 24th December to the 8th January inclusive were Gazetted holidays. The application to set aside the award, should, under Article 158, have been filed on the first open day after the holidays, *viz.*, 9th January. No application was made for copy of the award till the 9th January. The copy was given on the 10th January. It was returned for additional particulars and refiled on the 22nd January 1903. The last clause of section 12 of the Regulation allows the period of Limitation, exclusive of the time requisite for obtaining a copy of the award. In the present case, under Article 158, the application might have been presented on the first open day after the holidays, *viz.*, on the 9th January. The copy being applied for on that day and being granted the next day, the appellant is entitled to add the time taken for obtaining the copy. Following the ruling I. L. R., XIX All. p. 342, we hold that the application which was for setting aside the award was in time.

The ground on which the appeal has been urged is that the arbitrators refused to examine the appellant's witnesses.

The defendant has deposed that, at the request of the arbitrators, he produced three witnesses. The arbitrators, however, would not hold any examination, saying it was time for meals ; and one of the arbitrators said the witnesses would not be examined in the after-noon as he had to go away about a case.

The three witnesses have deposed, corroborating the defendant's statements. The plaintiff has deposed virtually admitting

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the defendant's statements, though he stated that he did not see one of defendant's three witnesses. One of the arbitrators deposed that two of defendant's witnesses were examined: the other arbitrator deposed that they examined only one of defendant's witnesses, that the others did not come and defendant did not request their examination. On the evidence we have no doubt that the defendant has correctly stated his case as to the witnesses.

We think that the conduct of the arbitrator in refusing to hear the defendant's witnesses, when tendered by the defendant, was misconduct within the meaning of section 521 (*a*), Civil Procedure Code. We allow the appeal and set aside the decree and direct that the suit be heard on the merits. Costs will follow the result.

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## APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice A. E. Staley, Chief Judge,*
*Mr. Justice A. Rangaswami Iyengar and*
*Mr. Justice H. V. Nanjundayya.*

1904. November 28.

KRISHNASWAMI, MINOR BY HIS GUARDIAN SHAMANNA, APPELLANT, (1st DEFENDANT)

*v.*

NARASIMHA MURTHY AND 3 OTHERS, RESPONDENTS, (PLAINTIFFS).*

*Hindu Law—Widow—Adoption—Authority to adopt given by husband—Second adoption on the death of first adopted son—Validity—Selection of a boy, restrictions regarding—Binding character thereof—Will, construction of—Law applicable to Mysore.*

Under a Will left by N, a Hindu, his widow L was authorized to take a boy in adoption and if the adopted boy mis-behaved to adopt another boy. Accordingly L adopted a boy who died unmarried a few years after the adoption. L then adopted her brother's son K. Subsequently the brother's sons of N sued for a declaration that the second adoption made by L was invalid and that they were the rightful heirs to the property left by N and also for possession of those properties. The lower Court passed a decree in favour of plaintiffs. In appeal it was contended on behalf of the adopted

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* Regular Appeal No. 374 of 1902-03 against the decree of the District Judge of Mysore in Original Suit No. 2 of 1901-02.

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son that the adoption was valid and that the construction put upon the Will left by N by the lower Court, was erroneous.

*Held*, that the Will empowered the widow to make several adoptions for the purpose of continuing the testator's lineage and estate.

*Held further*, (Justice RANGASWAMI IYENGAR, dissenting), that the Will did not contain any restrictions concerning the selection of any particular boy, that the widow was within her power to make the adoption in question and that the adoption of K was valid.

Per Justice RANGASWAMI IYENGAR, that the instructions contained in the Will regarding the selection of a boy for adoption must be considered as mandatory in the case of the widow and that as she had failed to follow those instructions the adoption made by her was not valid.

The law of adoption found by the British Courts to be applicable to Southern India must be held applicable in this State.

The facts of the case as stated in the judgment of the District Judge of Mysore are as follows:—

" The plaintiffs are the grand-nephews, *i. e.*, the brother's son's sons of the late Bakshee Narasappa of Mysore. He had an elder brother named Amildar Soobbaraya who had (5) sons named Ramanna, Seshayya, Puttiah, Aswathiah and Ananthaiah respectively. All these are dead now. Seshiah and Annanthiah have no issue. Aswathiah had two sons of whom one is alive and the other Narasinga Row *alias* Singanna who had been adopted to Bakshee Narasappa by his widow Latchimidevamma is dead.

The 1st, 2nd and 3rd plaintiffs are the sons of Ramanna. The 4th plaintiff is the son of Puttiah. Ramanna had also another son named Shamanna but he is dead. Of his two sons Rama and Murti one is alive and another is dead.

The 2nd plaintiff has 4 sons of whom two have been married and two are still young. The 3rd and 4th plaintiffs have each a son now.

Bakshee Narasappa had some patrimony but he gave it with some property of his own acquisition to his brother Soobbaraya and obtained a deed of release in the year 1857, and thus became the sole absolute owner of all the property subsequently acquired by him.

By his intelligence, prudence and tact, Bakshee Narasappa rose to a position of trust and confidence in the palace and amassed



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a fortune which forms the subject of contention between the parties in the present suit.

Bakshee Narasappa died on or about the 21st of August 1878. He had four sons and two daughters all of whom had died when he made his Will in 1873, authorising his widow to adopt a son to him and bequeathed his property to her, subject to certain trusts for charitable and religious purposes.

Two of his sons and daughters died young, while the other two sons died without issue leaving two widows who appeared to be still alive subsisting upon the property allotted for their maintenance under the Bakshee's Will. Subsequent to the Will another daughter was born to him, so that at the time of his death his only heirs were this daughter and his widow. This daughter who had been married to the present manager of the minor 1st defendant's property also died before the widow leaving a daughter. The widow adopted first one of the two sons of Aswathiah, mentioned above, but he died unmarried some years after the adoption. She again adopted the minor first defendant, her own brother's son on the 8th of October 1900 under the alleged authority of the Bakshee and with the assent of the 4th plaintiff and appointed the 2nd defendant, a distant cousin and dependant of the family as manager of the 1st defendant's property during his minority. She also gave the 2nd defendant two lands out of those bequeathed to her by the Bakshee, in consideration of his past and future services and died on or about the 12th of October 1900.

The present suit was commenced by the plaintiffs in *forma pauperis* in the month of January 1901, with the object of establishing their right to and of recovering possession of the moveable and immoveable property particularised in the schedules on the ground that the 1st defendant's adoption was invalid and that as the nearest cousins of the Bakshee and his first adopted son, they were entitled to the same."

The material portions of the will dated 22nd September 1873 executed by the deceased Bakshee Narasappa were to the following effect:—

* * * * * * *

"As I have no children born to me, and as there is fear of my family becoming extinct, I have thought and resolved that a son should be adopted for perpetuating the family. To adopt according to the Shas-

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tras (and rites), a son from among the near "gnatis" or among the distant "gnatis" is the proper plan. But if no child fit and becoming our family be available among the "gnatis," the adoption may take place from the family of the maternal uncle, of the father-in-law, or of the brother-in-law. And if a suitable boy be not available among those persons (families), I have, of my own free will, resolved to take and adopt a boy becoming our family, at least from among other relations. If this object cannot be accomplished during my life-time, I have given permission to you, my wife. You may in that manner and as stated above adopt a son even after my death. That adopted son should be obedient to you, my wife and his guardian, till he reaches his 20th year. And that adopted son should not independently alienate by sale, mortgage, &c., any of the movable or immoveable properties acquired by me including house, land. That adopted son should not do anything in the least without your guardian's permission. And whatever this adopted son may, however, do in wicked ways shall be invalid, it can never become valid. In spite of this, if he disobey you and if he without your consent fall into wicked ways through the influence of wicked men, all that he may do shall not become valid. It can never become valid. If the conditions of this Will be placed before the Sircar in respect of the actions of the adopted son in wicked ways, there is no doubt that such actions done without your permission, will be held invalid. The adopted son should be obedient to you as guardian throughout life. In case he should disobey you, and in case the good name and fame I have earned in this country, is endangered, then "four respectable men" should be sent for and they should be informed of the misconduct of that adopted son; and on payment of Rs. 2,000 the maintenance of that adopted son, he should be driven out of the house. And he shall have no (further) right to the movable and immovable properties acquired by me. After that (expulsion) you, my wife, are given permission by me with my free consent, to adopt another fit and becoming boy. My wife who has obtained permission from me, is at liberty to make adoptions. Nobody shall raise any objection in her acting in this manner; she may freely act in these matters independently.

* * * * * *

But as it has been my chief object to perpetuate the family as detailed in the former part of this (Will), (the property) should be managed with scrupulous care for (the benefit of) a son (born of us), or for the benefit of an adopted son also who will be the means to perpetuate the lineage; apart from this, no portion (of the property) should be disposed of in any other way. I have given over to you the whole of this property to carry out that all that has been stated above; therefore none else has any right whatsoever to the same (property). * * *"

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This appeal first came on for hearing before a Bench consisting of Mr. Justice A. Ramachandra Iyer, Chief Judge, and Mr. Justice H. V. Nanjundayya who referred the case to the Full Bench.

The case then came on for hearing before the Full Bench constituted as above.

The Hon'ble Mr. *P. S. Sivaswami Iyer* and Messrs. *V. Raghava Char, S. Narayana Rao* and *B. Nanjundappa* for the appellants.

Messrs. *M. C. Ranga Iyengar* and *M. B. Varadaraja Iyengar* for the respondents.

JUDGMENT.—Mr. Justice H. V. NANJUNDAYYA.—The facts of this case and the various questions arising for determination therein are clearly set forth in the judgment of the District Judge.

2. The main question is concerned with the capacity of the widow Lakshmidevamma to make the adoption in dispute. The decisions of the Privy Council and of the different High Courts have established certain well defined distinctions as in force in different provinces of British India. So far, however, as this State is concerned, unless it is shown that any particular doctrine has been already adopted by a course of judicial decisions, there is no reason why we should follow one Court in British India rather than another for determining this important matter. It was with a view to settle this point that the late learned Chief Judge directed that the case should be re-argued before us. This has been very ably done by the learned Advocates on both sides.

3. A number of precedents taken from the records of the late Huzur Adalat Court have been examined bearing on the subject of adoption. The question before us has not been expressly considered in any of them. But in certain cases, however, we find it assumed that the widow required either the authority of the husband or that of the agnates, the matter in dispute generally being whether such authority in fact existed. In Appeal No. 12 of 1848, the adoption set up was held not to be proved, but the allegation that the act had been done with the consent of the caste men and the *dayadees* is worthy of notice, and no allusion is made to any authority from the husband. A widow was made to take a son of her husband's brother as *abhimana-putra* under the sanction of her father-in-law, and this was upheld as being a valid adoption,

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the Pandit supplying an authority that the omission of the usual ceremonies did not affect the validity of the act in the case of a brother's son—(Ap. No. 2 of 1853). In Appeal No. 21 of 1860-61, the adoption was alleged to have been made with the authority of the deceased husband, but was held as not proved and as invalid on other grounds. In 13 of 1862-63 the alleged authority of the husband was held not proved. The opinion of the Court Pandit is recorded that a widow in an undivided family which has also divided gnatis living can make an adoption only with the actual authority of her husband or with the consent of the undivided and nearer gnatis.

4. Coming now to the reported cases, in *Venkata Lakshammanee* v. *Hanumantha Veera Raj Urs,* (I Mysore L. R., 128) an authority by the husband was alleged. In *Baswaraj Urs* v. *Nunja Raj Urs,* (III Mysore L. R., 37) there is a dictum that "if the widow had no authority the adoption was clearly null and void;" but an authority actually set up was held not proved. Both the authority and the adoption alleged were disbelieved in the case of *Timma* v. *Siddamma* (IV Mysore L. R., p. 88). In *Nanammah* v. *Ramiah,* (V Mysore L. R., p. 24), the husband's authority was expressly relied on. In two cases, it was taken for granted that the authority of the husband or his sapindas required to validate an adoption by a widow (*Srinivasiengar* v. *Venkatacheliengar,* XI Mysore L.R., 102; *Honnavalli* v. *Honnavalli Siddah,* XIII Mysore L. R., 45). In the recent case of *Linge Gauda* v. *Kempamma,* (R. A. 45 of 1901-02), the adoption was declared to be invalid as the authority said to have been given by the husband was held not proved.

5. The contention that the widow has independent power to make an adoption has not been raised in any of these cases. The Courts have had no occasion to weigh the authority of either texts or decided cases on both sides, and to arrive at a deliberate conclusion. If the question can be considered as still open, there is a great deal to say, in my opinion for the view adopted in Bombay. But the precedents extending over more than half a century show that this contention was never raised; and it may fairly be inferred that the point would not have been neglected if there was any chance of urging it with success. Rightly or wrongly, the law has been practically settled that way, and it is too late to disturb it now by con-

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sidering the matter as still open to doubt. On this ground, we informed the parties in the course of hearing that it would be taken as concluded by authority.

6. After all, the parties in this case also have proceeded on the assumption that the widow required some external authority for her act. In fact, more than one authority is mentioned in Exhibit A. The passages are as follows:—

"ಡಿಟೆಯ ವಿಲ್ಲಿನಲ್ಲಿ ನಮ್ಮ ಯಜಮಾನರವರು ಕೊಟ್ಟಿರುವ ಆಜ್ಞಾನುಸಾರವಾಗಿ ಶ್ವಶುರವಂಶಸ್ಥನಾಗಿರುವದ್ದರಿಂದಲೂ ಜ್ಞಾತಿಗಳು ನಾನು ಸ್ವೀಕಾರಮಾಡಿಕೊಂಡು ವಂಶಾಭಿವೃದ್ಧಿಪಡಿಸಬೇಕೆಂದು ಲೇಖನ ಮೂಲಕವಾಗಿಯೂ ವಾಚ್ಯಾಮೂಲವಾಗಿಯೂ ಒಪ್ಪಿರುತ್ತಾರೆ. ಈ ಸ್ವೀಕಾರವಿಷಯದಲ್ಲಿ ಶ್ರೀ ಶೃಂಗೇರೀ ಜಗದ್ಗುರುಗಳವರ ಅಪ್ಪಣೇ ಪಡದಿದ್ದೇನೆ. * * * * *

(After signature and attestations) . . . . . . . . . .
ಶ್ರೀಮನ್ಮಹಾರಾಣಿ ರೀಜಂಟರವರಲ್ಲಿಯೂ ಶ್ರುತಪಡಿಸಿದ್ದೇನೆ, ಆದ್ದರಿಂದ ಸ್ವೀಕಾರವು ಸಿದ್ಧಪಡಿಸಲ್ಪಟ್ಟಿರುತ್ತೆ . . . ."

I have purposely quoted the original passage, for it leaves it doubtful whether the lady meant to rely on the authority of the will for the adoption, or referred to the will merely to justify her selection of this boy who belonged to swasura's (father-in-law's) family of her husband. The other authorities are the consent (oral and written) of gnatees; the permission of Sri Guru of Sringeri; and the report made to (and permission presumed apparently of) H. H. the Maharani Regent. The appellant did not seriously contend that these three latter ingredients mentioned in Exhibit A added any strength to the validity of the adoption. Though it is perhaps too late now to contend that the permission of the Guru and that of the King or Government validates an otherwise invalid adoption, still it was not purposeless ignorance that dictated the mention of these authorities. A passage of Vasistha frequently quoted in this connection (ಪುತ್ರಂ ಪ್ರತಿಗ್ರಹೀಷ್ಯನ್ ಬಂಧೂನಾಹೂಯ ರಾಜನಿಚಾವೇದ್ಯ ನಿವೇಶನಸ್ಯ ಮಧ್ಯೆ &c.) says expressly that "the King" should be informed; and a sloka quoted as from Datta Makaranda gives some recognition to the permission from the Guru and the King in this connection: (ವಿಭಕ್ತಪತಿಕಾನಾರೀ ಸ್ವಧನೇನೋಪಜೀವಿನೀ ಪುತ್ರಸ್ಯಗ್ರಹಣೇ ಶಕ್ತಾ ಗುರುಬಂಧುನೃಪಾಜ್ಞಯಾ.) It is

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probably with a view to obtain what support may be considered as due from such authorities to an adoption so effected that the document has been drawn up in these terms. There is, however, no real authority for holding that the assent of the Guru or the Government has any legal consequence in a transaction of this kind and the learned Advocate was apparently well advised in ignoring these two factors on behalf of the appellant.

7. The assent of the *gnates,* however, stands on a different footing. The authority of the gnates set up is evidently what is contained in Exhibits I and II. The latter is a letter of condolence written by the 4th plaintiff soon after her daughter's death in July 1897; and it is followed up by Exhibit I (which is a registered document) in October. Both these papers are quite clear as regards the attitude of the 4th plaintiff. I think that the learned District Judge has gone further than the pleadings and evidence quite warrant in practically coming to the conclusion (which however is not expressly enunciated, pp. 14 and 15 of the Printed Record) that the assent was obtained by the exercise of undue influence. The excuse given for not putting the 4th plaintiff in the witness box, that he was not given leave is absurd on the face of it, as the man would, if he had useful evidence to give, have taken the risk of going without leave, when the question lay between a petty appointment of 8 Rs. as a peon in a Taluk Cutcheri and a substantial share of a rich inheritance. It must be noted also that there was a long interval between the date of Exhibits I and II and that he had time enough to take proper advice and to withdraw his assent, before he was asked to embody it in a registered document. In all such self-denying transactions, there may fairly be assumed to have been some external solicitation to bring them about; but the existence of such undue influence and coercion as is sufficient to avoid them altogether cannot be presumed on behalf of a party who has deliberately entered into them. In opposition to the reasons given by the learned judge, I may draw attention to the circumstances that the officer, who is evidently assumed to have exercised such undue influence was just then smarting under the misfortune of his wife's death, and that after all, he had no particularly strong interest in securing an adoption for the family. The assent therefore of the 4th plaintiff should be taken to have been voluntarily

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given; and there is no evidence whatever to justify the conclusion that it was given from any improper motives.

8. The next question is whether from its terms, it should be held that Exhibit I was due to surprise or misrepresentation. The purport of the authority given in this respect to the widow by the will of Bakshi Narasappa is given in the document as a preamble. The rendering of the terms of the will is quite accurate; the language used does not show that the plaintiff was quite clear whether he understood thereby that an unqualified authority had thereby been given to the widow to be available for this adoption. On the other hand, it clearly appears that the parties had doubts in the matter; and wished to fortify themselves by means of this registered document. The very fact of its execution in this deliberate manner shows that this plaintiff knew the exact situation when he signed Exhibit I. He has not chosen to come into the witness box and swear as to what exactly induced him to execute this paper. The plaint which he has signed makes no mention of his share in bringing about this adoption; in fact, paragraphs 3 and 4 are so drawn up as to show that he knew absolutely nothing of the fact of the adoption and how it had been brought about. It is preposterous to ask at this late stage that the Court should assume without any evidence that 'the widow and her advisers should have misrepresented the matter to the 4th plaintiff, and that he, misled by their statements, should have executed the deed.'

9. Very little was made, however, of this authority by the counsel who argued the case for the appellant. It was on the will of the Bakshi (dated 22nd September 1873) and the direct and indirect authority to be derived therefrom that he mainly relied. It will be convenient next to consider the effect of this all important document. The main passages referring to the authorisation may be summarised and arranged as follows:—(*a*) As all the male and female issue I had has disappeared, I am unable to bear the extreme grief thereby caused, and make my will on that account. "As my family is likely to become extinct for lack of *aurasa* sons to me, I have resolved upon taking an adopted son at least to ensure the future continuance of this family." After giving rules which should, in his opinion, guide the choice of a boy, the testator continues (*b*) 'If this act do not take place before my

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death, as I hereby direct you, you should adopt a boy after me in the manner above described.' (ಈ ಕಾರ್ಯವು ನಮ್ಮ ಪರ್ಯವಸಾನದವರೆಗೂ ಸಂದರ್ಭ ಪಡದೆಹೋದಪಕ್ಷದಲ್ಲಿ ನಮ್ಮ ಪತ್ನಿಯಾದ ನಿನಗೆ ಆಜ್ಞೆಕೊಟ್ಟದೇವೆಯಾಗಿ, ಆಪ್ರಕಾರ ನಮ್ಮ ಅನಂತರವಾದರೂ ಮೇಲೆ ಹೇಳಿದ ಮೇರಿಗೆ ಒಬ್ಬ ಪುತ್ರನನ್ನು ತೆಗದುಕೊಂಡು ದತ್ತು ಸ್ವೀಕಾರವನ್ನು ಮಾಡಿಕೊಳ್ಳುವುದು).

Certain directions and limitations are laid down for regulating the rights and conduct of the adopted son ; and the consequences of his contravening them are laid down in these terms:—(c) "If, in disobedience of your wishes, the adopted son should be likely to spoil the good name earned by me in this State, you should call in four well-conducted *grihasthas* (house-holders) and lay these things before them; and send away the adopted son from our house, after giving him 2,000 Rs. for maintenance. (Thereupon) that adopted son shall have not the least right to my moveable and immoveable property. After that you my wife may take another fit boy suitable for our family and adopt him. I have given this permission quite deliberately to you my wife. My wife who has obtained my permission is free herself to make an adoption. (ನಮ್ಮಿಂದ ಆಜ್ಞೆ ಪಡೆದಿರುವ ನಮ್ಮ ಪತ್ನಿಯು ದತ್ತು ಸ್ವೀಕಾರಗಳನ್ನು ಮಾಡಿಕೊಳ್ಳುವವಕ್ಕೆ ಸ್ವತಂತ್ರಳಾಗಿದ್ದಾಳೆ. ಈಮೇರೆ ನಡಸುವದಕ್ಕೆ ಯಾರೊಬ್ಬರ ಆಕ್ಷೇಪಣೆಯೂ ಉಂಟಾಗಲಾರದು, ಸ್ವತಂತ್ರಿಸಿ ಈ ಕಾರ್ಯಗಳನ್ನು ನಡಿಸಬಹುದು.) She may freely carry out these things herself without anybody's objection."

10. Then follow a recital of the deathbed scenes of his two sons, showing that they both (quite naturally in the circumstances) declined to have any adoptions to themselves, and directions that the widows should be maintained out of portions of the estate set apart. It is also described how his elder brother Subba Row had separated his interest, and how all the property was his own self-acquired property, without any contribution from either of his deceased sons. A long list of the houses, lands, &c., is given; and the following important words are inserted at the end of the document:—(d) "all the rest of the property (except what was left to the sons' widows for their lives) should be kept in your *i. e.* my wife's possession. But as my chief object is to continue the family as described in the beginning of this (will), you should guard and



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manage the property with superior skill for the benefit of an *aurasa* (natural) or adopted son who will be the cause of continuing the family, and by no means deal with it in any other manner. As I have given you all this property for the purpose of using it in the manner laid down above, no one else has any right whatever therein." (ಆದರೆ ಇದರ ಪ್ರಾರಂಭದಲ್ಲಿ ವಿವರಿಸಿರುವ ಮೇರೆ, ವಂಶವನ್ನು ವೃದ್ಧಿಮಾಡಿಸತಕ್ಕದ್ದೇ ನಮ್ಮ ಮುಖ್ಯ ಅಭಿಪ್ರಾಯವಾದ್ದರಿಂದ ಮುಂದೆ ಪರಂಪರೆಯಾಗಿ ವಂಶಾಭಿವೃದ್ಧಿಗೆ ಕಾರಣವಾದ ಔರಸನಾಗಲಿ ಅಥವಾ ಸ್ವೀಕೃತಪುತ್ರನ ಗುಣಕ್ಕಾಗಿಯೂ ಕೂಡ ಅಧಿಕವಾದ ಬುದ್ಧಿವಂತಿಕೆಯಿಂದ ಜತನಪಡಿಸಬೇಕಲ್ಲದೆ ಈಪೈಕಿ ಎಷ್ಟುಮಾತ್ರವಾಗಲಿ ಮತ್ಯಾವ ವಿಧವಾಗಿಯೂ ವಿನಿಯೋಗಿಸಕೂಡದು. ಮೇಲೆ ವಿಧಾಯಕವಾಗಿರುವ ರೀತಿ ನಡೆಯುವದಕ್ಕೋಸ್ಕರ ಈ ವಿಶಿಷ್ಟ ಆಸ್ತಿಯನ್ನು ನಿನಗೆ ಕೊಟ್ಟಿರುತ್ತೇವೆಯಾದಕಾರಣ ಇದರಲ್ಲಿ ಮತ್ಯಾರಿಗೂ ಎಷ್ಟುಮಾತ್ರವೂ ಬಾಧ್ಯತೆ ಇರುವದಿಲ್ಲ).

11. The question is whether this document should be construed as authorising a second adoption on the death of the first adopted son. It is a trite rule that, in construing such a document, we should read it as a whole, and take all the passages into consideration to gather the intention of the testator. The learned District Judge quite recognises this, and has, in applying it, arrived at the conclusion opposed to the appellant's case. It seems to me, however, that there are stronger reasons to come to a different conclusion on the matter.

12. Bakshi Narasappa's chief object was that his family should be continued. As his family was likely to become extinct, he resolved upon adopting a boy to ensure the continuance of this family. If he died without carrying this out, his wife was directed to do so. He was anxious not only for the continuance of the family but also that the adopted boy should keep up its position and dignity. If he misbehaved in such a manner as to bring discredit, the widow was authorised to supersede him. Not satisfied with this, the testator reiterates in the end that his chief object is to ensure the continuance of the family, and that the property should be administered and guarded by the widow for the ultimate benefit of either a natural or an adopted son who would bear the family name.

13. It is stated that, where a widow has been directed to adopt *a son*, her authority is exhausted as soon as she has made a single adoption. (Mayne H.L. p. 142, quoting 12 M.I.A., 356). Whether

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the authroity should be construed narrowly or liberally depends not only upon the terms of the particular authority but also upon the nature of the act, *i. e*, whether it is in one that the law merely tolerates as an exceptional concession, or whether it is viewed as a matter of ordinary course. It has been laid down that, in construing a Hindu Will, you must have regard to the ordinary notions and feelings of Hindoos (*Mahomed Shumsool* v. *Shewukram,* 2 I. A., p. 7). This is rule of common sense ; for the primary object of the interpretation of such a document would be whether the particular question in dispute was within his contemplation when he drew up his will, and if so, what his intention exactly is—either stated in express terms or to be gathered as a logical inference from his expressed wishes. There seems to be absolutely no warrant in the indigenous authorities on the subject for the position that the act of adoption should be viewed with disfavour. On the other hand, it would appeal to a Hindu anxious to follow the tenets and beliefs of his religion to be a specially meritorious act.

"For adoption in so far as it would directly tend it increase religious acts and ceremonies, would be a commendable act, the performance of which the Hindu religion would encourage." (Mandlik's Hindu Law, p. 462). Compare also the slokas from Atri and Manu quoted in the first section of Datta Mimamsa, Whitley Stoke's Hindu Law Books, pp. 531 and 533.

There is no justification therefore for supposing that such authorities to adopt should be subject to any narrow rule of interpretation.

14. What then was the testator's meaning in this case? He has plainly stated the object that he had in view the continuance of his family. If he should die without a natural son, his widow should supply the want by the adoption of a boy from another family. The learned Advocate for the Respondents contended that it was meant to use this phrase ಒಬ್ಬ ಸ್ವೀಕೃತ ಪುತ್ರನನ್ನಾದರೂ restrictively as to number; but this contention is not sustainable. The context refers to the act of substitution and the particle ಆದರೂ (at any rate) is meant to denote that an adopted son is to be taken as a sort of inferior substitute for a natural one. As he is referring in that sentence to his own resolve to make an adoption himself, the singular

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number cannot have been meant to place any restriction on the authority given to the widow.

15. A direction to the widow to adopt a boy along with a living son, which was illegal and could not be carried out, did not authorise the widow, it was held, to adopt after the death of her son. (Mayne H. L. p. 142). The same principle would have to be applied in this case, if the general authority had to be deduced from the illegal power given to the widow to supersede the adopted son if he disobeyed her or misbehaved himself, by making another adoption. But that does not seem to be the correct inference from this attempt of the testator to give the widow this extraordinary power. From the way in which he repeats his object more than once and his last injunction to the widow that the property should be so administered as to inure to the ultimate benefit of the son that would continue the family name, the testator thought that he had evinced his desire that the widow should leave a son to represent a family at the time of her death. The most natural construction to be placed on the authority thus given is that it was meant to be a general authority to make an adoption, which authority should be construed as subsisting as long as there is any occasion for exercising it. It seems to me that it is his understanding the permission in this sense, not any superstitious dread of alluding to the death of the adopted boy, that made Narasappa not provide for the event of the death of the first adopted boy. He mentions the case of his misbehaving and provides for it expressly, because the widow would not have that power under the general authority given to her. The last words of this paragraph (following the permission to make an adoption, superseding the adopted. boy in the event of misbehaviour) are especially significant. ನಮ್ಮಿಂದ ಆಜ್ಞೆಪಡೆದಿರುವ ನಮ್ಮ ಪತ್ನಿಯು ದತ್ತುಸ್ವೀಕಾರಗಳನ್ನು ಮಾಡಿಕೊಳ್ಳುವುದಕ್ಕೆ ಸ್ವತಂತ್ರಳಾಗಿ ಇದ್ದಾಳೆ. ಈರೀತಿ ನಡಿಸುವದಕ್ಕೆ ಯಾರೊಬ್ಬರ ಆಕ್ಷೇಪಣೆಯೂ ಉಂಟಾಗಲಾರದು. ಸ್ವತಂತ್ರಿಸಿ ಈ ಕಾರ್ಯಗಳನ್ನು ನಡಿಸಬಹುದು. This passage is translated but not quite accurately in the last two sentences of the paragraph in lines 38-41, p. 34 of the printed record. The accurate literal rendering is: "My wife who has received my mandate is free herself to make adoptions. In her acting in this manner, there can be no objection of anybody. Of her own free (or independent) will, she may do these acts." The word adoptions

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is used in the plural number. The Respondents' counsel argued that the word had reference to the two adoptions (the first one and the contemplated illegal one) mentioned in the paragraph. That it was used in a more general sense appears from the absence of the demonstrative particle ಈ (these) or its equivalent to qualify the word. In whichever way the matter is viewed, I think that the authority should be taken to be a general one. The case of *Surya-narayana* v. *Venkataramana* (26 Mad,. 681) is the latest authority in Madras on the point; and the following passage seems to lay down the law quite correctly: "We are not aware of any judicial decision which would bind us to hold that the husband's authority in circumstances like the present is so completely worked out by the first adoption as to prevent the widow from acting upon it when necessity arises for a fresh adoption, the estate being still vested in her, and being liable to be divested by such adoption. We are of opinion that the husband's authority held good for the second adoption also. The object and purpose of the authority given by the husband was to perpetuate his family as well as to secure his spiritual benefit and it would be unreasonable to hold that an accident such as the early death of the boy first adopted should be allowed to frustrate the fulfilment of his object and to preclude the widow from making another adoption in the absence of any legal impediment to her doing so. When the general intention of a Hindu to be represented by an adopted son is clear, as in this case, there seems no reason why effect should not be given to such intention, if it is possible to do so without contravening the law." (p. 684). It is needless to refer to other authorities.

16. The next question is, whether it should be held that the terms imposed on the widow in respect of the selection of a boy have been contravened in this case so as to render the adoption invalid. The alleged restrictions are contained in the following passage of the will:—

As it appears that our family is likely to become extinct on account of our having no natural born sons we have thought of and resolved upon, adopting at any rate, an adopted son for

ನಮಗೆ ಔರಸ ಪುತ್ರರಿಲ್ಲದೆ ನಮ್ಮ ವಂಶ ನಿಂತುಹೋಗುವದಾಗಿ ತೋರಿದ್ದರಿಂದ, ಮುಂದೆ ಯೀವಂಶ ನಡೆಯುವದಕ್ಕೆ ಒಬ್ಬ ಸ್ವೀಕೃತಪುತ್ರನನ್ನಾದರೂ ದತ್ತು ಸ್ವೀಕಾರವನ್ನು ಮಾಡಿಕೊಳ್ಳಬೇಕೆಂದು ಆಲೋ

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continuing the family. That son being from among the near gnatis or distant gnatis, the proper thing is to take (such) a son and adopt him as one's own according to Sastra. If it should happen that no suitable boy fit for our family is available among the gnatis, a boy should be selected and adopted from the maternal uncle's, or father-in-law's or brother-in-law's family. If among these a suitable son is not available, I have resolved in my mind to select and adopt a son worthy of our family from other relations at any rate.

ಚೆಸಿ ನಿಶ್ಚಯಿಸಿದೇವೆ. ಆ ಪುತ್ರನು ಸಮೀಪದ ಜ್ಞಾತಿಗಳಲ್ಲಿಯೋ ಆಗಲಿ ದೂರದ ಜ್ಞಾತಿಗಳಲ್ಲೋ ಆಗಲಿ ಒಂದು ಪುತ್ರನನ್ನು ತೆಗೆದುಕೊಂಡು ಯಥಾಶಾಸ್ತ್ರೀಯವಾಗಿ ದತ್ತು ಸ್ವೀಕಾರವನ್ನು ಮಾಡಿಕೊಳ್ಳತಕ್ಕದ್ದು ಯುಕ್ತವಾದದ್ದು. ಒಂದು ವೇಳೆ ಜ್ಞಾತಿಗಳಲ್ಲಿ ಯೋಗ್ಯವಾದ ನಮ್ಮ ವಂಶಕ್ಕೆ ಅರ್ಹವಾದ ಮಗು ಅನುಕೂಲಿಸದೆ ಹೋದಪಕ್ಷದಲ್ಲಿ, ಮಾತುಳ ವಂಶದಲ್ಲೇ ಆಗಲಿ, ಶ್ವಶುರ ವಂಶದಲ್ಲೇ ಆಗಲಿ ಶಾಲಾ ವಂಶದಲ್ಲೇ ಆಗಲಿ ಒಬ್ಬ ಪುತ್ರನನ್ನು ತೆಗೆದುಕೊಂಡು ದತ್ತು ಸ್ವೀಕಾರಮಾಡಿಕೊಳ್ಳತಕ್ಕದ್ದು. ಆ ಜನದಲ್ಲಿ ಯೋಗ್ಯನಾದ ಪುತ್ರನು ಅನುಕೂಲಿಸದೆಹೋದ ಪಕ್ಷದಲ್ಲಿ ಇತರ ಬಂಧು ಜನರಲ್ಲೇ ಆಗಲಿ ನಮ್ಮ ವಂಶಕ್ಕೆ ಅರ್ಹನಾದ ಒಬ್ಬ ಪುತ್ರನನ್ನು ತೆಗೆದುಕೊಂಡು ದತ್ತು ಸ್ವೀಕಾರವನ್ನು ಮಾಡಿಕೊಳ್ಳತಕ್ಕದ್ದೆಂದು ನಮ್ಮ ಮನಃಪೂರ್ವಕವಾಗಿ ನಿಶ್ಚಯಿಸಿದ್ದೇವೆ.

17. In the first place, it was contended for the appellant that the testator did not state what he wished to be a positive rule of selection, but merely what he conceived the injunctions of the shastra were on this head. This is quite probable—almost the very order being given in some of the texts quoted in a well-known book of authority in this part of the country—Vaidyanatha's treatise called Smriti-Muktaphala* (or more generally as Vaidyanathiya). It is not clear that the testator wished to introduce this as restrictive of choice in any sense, or whether he merely recommended this as the

* ಬ್ರಾಹ್ಮಣಾನಾಂ ಸಪಿಂಡೇಷು ಕರ್ತವ್ಯಃ ಪುತ್ರಸಂಗ್ರಹಃ।
ತದಭಾವೇ ಸಗೋತ್ರೇ ವಾ ನಚಾನ್ಯತ್ರ ತು ಕಾರಯೇತ್ ..........................p. 148

ಸ್ವವಂಶ್ಯಾನಾಮಭಾವೇ ತು ಪುತ್ರಸ್ತ್ವ ಮಾತೃವಂಶಜಃ..........................
ಜ್ಞಾತೀನಾಂ ಕುಲಜಾತಾನಃ ಉತ್ತಮಃ ಪರಿಕೀರ್ತಿತಃ।

ಮಧ್ಯಮಾ ಮಾತೃಕುಲಜಾ ಅಧಮಾ ಸ್ವಸ್ಯಗೋತ್ರಜಾಃ......................p.149
Telugu Edition, Mysore.

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regular course to be adopted, as he says that this would be the proper thing (ರು೯ಷದ ದು). It may, however, be conceded that he meant to follow this order, if possible, in case he himself adopted a boy. It is not disputed that he could have ignored this injunction with impunity; but the contention of the respondents is that what was merely optional with him, becomes mandatory on the widow on whom the authority is conferred.

18. The passage relied on shows clearly what the testator thought to be the orthodox rule of selection. There is no doubt that he could have ignored this order at his option, as it was at best only one of moral obligation. In the passage immediately following this (already quoted) he says that, after his death, the widow should make an adoption "in the manner above described." (The translation on p. 34 of the Printed Record is not quite accurate). By the force of these last words, it may perhaps be conceded, the same order of selection is meant to be prescribed for the widow's guidance also, when making the adoption for the first time. But there is no warrant whatever for holding that the testator wished to give a wider operation than that to these words of limitation. After allowing the widow to cut off the adopted son with Rs. 2,000, he authorises her to "adopt a boy fit and worthy of our family," but does not refer to the previous rule of selection at all, as he did in the case of the original adoption. The succeeding clauses emphasise that the widow was given free and unrestricted power of action in the matter of "making adoptions."

19. Moreover, the widow was the sole judge, according to the will, of the fitness of the boy to be adopted; and if, without going out of the various clauses mentioned in the will, she exercised her discretion and left out some of the classes altogether, it does not seem open to the objectors to say that she is bound to make out that she had considered the rival claims of all the other candidates before deciding on taking a particular person in adoption. By her taking this boy, it may be fairly presumed that, in her opinion, he was the fittest to be adopted; and there is no reason why the plaintiffs should be allowed to question her motives or her good faith, merely because the boy happens to be her brother's son.

20. On both these grounds, therefore, *i. e.*, that the will does not contain any restrictions concerning the selection of any particu-

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lar boy, and that the widow was within her power even if restricted as contended by the plaintiffs, I would hold that the adoption should be upheld as valid.

The other questions that have been raised in the judgment of the lower Court, need not be considered at any length after this finding. But I think it just as well to state the conclusions that I have arrived at shortly. Some of them such as the alleged oral authority were not pressed in this Court. On the assent of the 4th plaintiff, I have already dwelt at length, and hold that it has not been made out to have been other than a voluntary and deliberate act on his part. As to whether it should be held to be sufficient authority, I am not prepared to give an opinion either way, as the question (which is one of considerable importance) does not properly arise in this case. The question whether the motives of the widow should be discussed also does not fortunately arise in this case. I would only remark that it is an extremely hazardous undertaking for a Court to embark upon, and that unless compelled by absolute necessity, I would avoid basing any decision about the rights of parties on such speculations. There is no doubt whatever that the widow took no absolute interest in the property as contended for by the defendants, and the final words of the document (as observed by the District Judge) are quite conclusive on the matter. If the adoption is held invalid, it is plain that the 1st defendant cannot take any part of the property as a devisee under exhibit A, both because in Exhibit A the widow does not profess to bequeath the property to him as a specially designated person, and she had no power to will it away even if she wished.

In accordance with my finding that the adoption is valid, I would reverse the decree of the lower Court, and dismiss the suit of the plaintiffs. But taking into consideration the doubtful nature of the questions of law involved in the suit, I would direct that each party bear his own costs.

Mr. Justice A. RANGASWAMI IYENGAR :—It was ruled in the course of the argument of the learned Advocate for the appellant that the Court was not prepared to go into the questions of the relative authority of the different texts on the law of adoption, what text books were applicable to Mysore and whether in view of the diver-

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sity of practice in the different provinces of British India as regards the powers of a Hindu widow to make an adoption with or without permission of her husband or his agnates, it was desirable to examine the original texts in order to come to a definite conclusion on that question for adoption in Mysore. And it was further held that in accordance with the course of decisions in the Province, the law applicable to South India as laid down by the Courts in British India should be followed. It becomes therefore unnecessary to refer to and discuss the elaborate arguments of the learned advocate on these points. The questions for determination in this appeal have been considerably narrowed and the points for decision may be stated briefly to be the following:—

(1). Whether Bukshi Narasappa's will confers authority on his widow to make more than one adoption? And if not whether she was competent to make it on other grounds.

(2). Whether the provisions of para 3 of the will regarding the selection of the boy to be adopted are merely recommendatory or *operative.*

(3). Whether the 4th plaintiff authorized the widow to make the adoption and it has the effect of making it valid.

(4). Whether Exhibits I and II estop him from calling the 1st defendant's adoption in question and whether the latter is entitled at least to his share of the property in dispute.

2. Bukshy Narasappa made this will on 22nd September 1873 and had no issue living then. He was however not without all hope of having children, for before he died on 21st August 1878, he had a daughter born to him. It is very necessary to bear this in mind in understanding the reason for his not making an adoption at once and for his desiring that his wife should make the adoption, in case it should not come to pass during his life-time. It is admitted tha his widow first adopted a boy who died after a few years and that her daughter also died subsequently leaving a girl before the second adoption in dispute was made. With these remarks we may proceed to the consideration whether the instructions in para 3 of the will



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authorized only one adoption or conferred on the widow power to make a second adoption on the death of the adopted boy.

3. I append hereto* what I consider to be an accurate translation of this para of the will. But before discussing its terms, it is desirable to take a survey of the whole will. In the second para he refers to the death of all his children and his unsupportable grief and says that he proceeds to draw up the will in consequence of such grief. In the first sentence of the 3rd para he gives expression to his fear that his faimily may become extinct and proceeds to lay down instructions for adoption by himself and his widow after his death.

* As I have no children born to me, and as there is fear of my family becoming extinct I have thought and resolved that an adopted son at least should be adopted for perpetuating the lineage. To perform the adoption according to the shastras of a son from among the near gnatis or among the distant gnatis is proper. But if no child fit and becoming our family be available among the gnatis, a son may be taken and adoption made from the family of the maternal uncle, of the father-in-law or of the brother-in-law. And if a suitable boy be not available among those persons (families), I have of my own free will resolved to take and adopt a boy becoming our family at least from among other relation. If this be not accomplished during my life-time, I have given permission to you my wife and you may adopt a son at least after my death as stated above. That adopted son should be obedient to you, my wife and his guardian, till he reaches his 20th year. And that adopted son should not independently alienate by sale, mortgage, &c. any of the movable or immovable properties acquired by me including house, land. That adopted son should not do anything in the least without permission of you (his) guardian. And whatever this adopted son may, however, do in wicked ways, shall be invalid; it can never become valid. In spite of this, if he disobey you, and if he without your consent fall into wicked ways through the influence of wicked men, all that he may do shall not become valid. It can never become valid. If the conditions of this will be placed before the Sirkar in respect of the actions of the adopted son in wicked ways, there is no doubt that such actions done without your permission, will be held invalid. The adopted son should be obedient to you as guardian throughout life. In case he should disobey you, and in case the good name and fame I have earned in this country, is endangered, then "four respectable men" should be sent for and they should be informed of the misconduct of that adopted son; and on payment of Rs. 2,000 for the maintenance of that adopted son, he should be driven out of the house. And he shall have no (further) right to the movable and immovable properties acquired by me. After that, you, my wife, are given permission by me with my free will

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4. In the 4th, 5th and 6th paras he refers to the circumstances at the time of the death of his two grown up sons and their disinclination to make any adoptions to themselves. This is probably introduced to prevent his widowed daughters-in-law from making any adoptions in competition with his wife. In para 7, he lays down that the widowed daughters-in-law were entitled only to maintenance which is specified and that the immoveable property assigned for their maintenance should on their death revert to the family. In paras 8 and 9, he proceeds to say that he had separated from his brothers and that all his property was self-acquired and that no one had any claim to the same. In paras 10 and 11, all the items of property are described in detail and he directs that with the exception of what is assigned for the maintenance of his daughters-in-law the rest should remain in his wife's possession. Then follows the last and important para of the will, in which he says that his chief object was to perpetuate his lineage as stated or detailed in the former part of the will, that the widow should carefully conserve the property for the benefit of the natural or adopted son and that she should not make any alienation of the same.

5. It will thus be seen that he was very anxious that his line should not become extinct and that all the property belonging to his family should continue to vest in it. To give effect to this intention he says in para 3 that he has 'resolved that an adopted son at least should be adopted for perpetuating the lineage. To perform the adoption according to the shastras of a son from among the near *gnatis* or among the distant gnatis is proper. But if no child fit and becoming our family be available among the gnatis, a son may be taken and adoption made from the family of the maternal uncle, of the father-in-law, or of the brother-in-law. And if a suitable boy be not available among those persons (families), *I have of my own free will resolved to take* and adopt a boy becoming our family at least from among other relations. If this be not accomplished during my lifetime, I have given permission to you my wife and you may adopt a son at least after my death *as stated above.*' Then follows

to take and adopt another boy fit and suitable to our family. My wife, who has obtained permission from me, is at liberty to make adoptions (Dattu Swikaragalanna). Nobody shall raise any objection to her acting in this manner; she may do these things independently.

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certain directions as to how the adopted son should conduct himself towards the widow and power is given to her to expel him from the family with a small maintenance if he should be guilty of misconduct. "After that you my wife are given permission of my own free will to take and adopt another boy fit and suitable to our family. My wife who has obtained permission from me is at liberty to make *adoptions* (*Datta Svikaragalanna*); no one shall raise any objection to her acting in this manner. She may do these things independently." Almost the whole of the 3rd para is quoted here as the exact intention of the testator will not be otherwise clear. The testator does not at once give his wife the authority to adopt. But he explains what he proposed to do himself to perpetuate the lineage and authorizes his wife to do the same and adopt a son in case it should not have come about during his life-time. It was argued for the respondent that the word *a son* used in the passage authorizing his wife to make the adoption after his death showed that her authority extended to only one adoption. It is however very clear that the article has no specific force in this passage as the same article has been used in the previous sentences in which he details what he himself preferred to do. On the other hand it appears to me that it may be gathered from the whole para that the testator did not merely think of making a solitary adoption without any thought that if the adopted boy should unfortunately die, his line would become extinct. The passages in this para should be construed with reference to the intention and object of the testator as gathered from the whole will. The permission given to the wife does not specify a particular boy or a boy in a particular class or group so as to indicate that the testator had in view only one adoption when he gave the permission. This case is also distinguishable from the one where permission for adoption is given orally or in writing without any further details. In the latter case there are naturally no data from which it would be inferred with what object the adoption was authorized and whether the testator could have thought of only one adoption or of more. But in this case Bukshy Narasappa has said in detail enough to make it clear that his intention was that his line should be continued, that he intended to make the necessary adoption and that if this was not effected during his life-time, his wife should carry it out. He also proceeds to provide even for the contingency

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of the adopted boy turning out unworthy by authorizing his wife to expel him and make a fresh adoption. Then the last sentence but one is that "my wife who has obtained permission from me, is at liberty to make *adoptions*." This in my view is a general power given to the widow to make more than one adoption not necessarily limited to the second adoption provided for in the case of the disobedience or misconduct of the boy adopted first. I agree with the appellant's Advocate in thinking that we should not adopt the strict rules of interpretation of Powers under English Law in the case of Hindu Wills authorizing adoption and we must pay due regard to the wishes of the testator in the matter and adopt that interpretation which will give effect to them as far as possible without contravening the expressed instructions of the testator. On the first question my opinion is therefore that the will permits more than one adoption by the widow and that she was competent to make a second adoption on the death of the first adopted son.

6. It was contended by the learned Advocate for the appellant, with reference to the first three sentences of this para about the selection of the boy to be adopted, that the testator simply quoted the shastras as to the order in which a boy should be selected and did not mean to lay down any injunction in the matter, that he has not addressed any directions to his wife and that the other passages in the will showed that he did not intend to fetter her choice. I am unable to agree with him in this view. It is clear from the wording of the passages in question that he did not merely quote the recommendations contained in the shastras. If the word according to shastras had governed the order of selection from the near or distant *gnatis*, there would be some justification for the contention on behalf of the appellants. These words are used in reference to the performance of the ceremony of adoption and has no application to the order of selection. Moreover if it were merely a quotation of the shastra on the point, the sentence would be differently worded and there would be no necessity for the use of the word "yukta" or proper. And in the 3rd sentence, the testator states that if a suitable boy be not available among those persons (families), I have of my own free will resolved to adopt a boy from among other relations. This passage shows clearly, that he intended to select the boy in the order mentioned in this para. It is

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true that he might have contravened what he proposed for his guidance and so far the instructions may be recommendatory. But when he proceeded to say that in case of his failure to accomplish the adoption, she might carry it out "as stated above" it is clear that he wanted her to follow the said instructions in proceeding to make the adoption. What was only recommendatory in his case must be considered mandatory in the case of his wife as her authority is derived from the same passage in the will. She is as it were only his proxy or agent in this matter and is not at liberty to travel beyond such instructions. The decided cases show that she cannot at discretion disobey *his expressed wishes* that any adoption made in contravention of the same even when circumstances made it unavoidable was invalid. It was urged that as the intention of the testator for the continuance of the lineage would be defeated and on the principal of *Factum valet,* the adoption in question should be upheld even if the instructions had not been complied with. But I am unable to subscribe to this view.

7. It was also argued that even if these instructions were binding on the widow as regards the first adoption, they cannot apply to the second adoption as they were not expressly referred to in the last two sentences of the third para where general authority is given to the widow to make adoptions. But the last sentence but one, refers to the wife having obtained permission from him and it must refer to the permission given in the early portion of this para and the conditions applicable to such permission must hold good in the case of subsequent adoptions also.

8. It was also argued that even under the shastras these injunctions were only recommendatory, that what is principally required is that the boy to be adopted should be *affectionate* and that the genius of Hindu Law favours the adoption as necessary for the benefit of a deceased husband. But it is not open to us to act upon these considerations when as I hold the husband has laid down certain express instructions. Though adoption is considered so meritorious and necessary, it is open to a widow to refrain from giving effect to the permission of her husband to adopt and thus defeat his intention. It is not in the power of any one to remedy this in the present state of the law. So also,

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where the permission given was peculiar or circumscribed with conditions which made it impossible to carry out the husband's wish for an adoption, it has been held that adoptions cannot be validly made. This is only another case where the adoption has to be held as invalid. It is proved by the evidence on behalf of the plaintiff that some boys standing in the position of agnates to Narasappa are available. The adoption of the 1st defendant who is only the son of his brother-in-law must be set aside as unauthorized and invalid.

9. I agree in thinking that the plaintiffs have failed to prove that the 4th plaintiff executed Exhibits I and II under circumstances which would make them invalid. They have not made any allegations about them in their plaint nor have they examined the 4th plaintiff or adduced any specific evidence. But it is stated in Exhibit I that Bakshy Narasappa's will authorized her to perpetuate the lineage by adopting a boy and that it is the wish of the writer that she should take a proper boy in adoption. This does not propose to confer on the widow an authority which she did not possess under the will. Moreover he is only one of the agnates. There is nothing to show that the widow consulted the others or that they refused to accord permission from improper motives. Under these circumstances the permission of this single sapinda does not appear sufficient to validate the adoption by the widow. This question however is not material to the case in the view that I have taken that the will itself authorized a second adoption but that the widow having failed to comply with the instructions laid down in the will, the adoption in dispute in not valid.

10. For the same reason it is unnecessary to consider the 4th question. Moreover it may be fairly argued for the 4th plaintiff that he requested her only to make a *proper* adoption as per authority of her husband and that she having failed to act up to it, he is not estopped from questioning the adoption. He cannot therefore be held to have lost his right to his share in the property in dispute.

11. For these reasons I am of opinion that the decision of the learned District Judge must be affirmed and this appeal dismissed with costs.

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THE CHIEF JUDGE.—I have concurred in the view taken by my learned colleagues that, on a consideration of the course of decisions in this State, the law found by the British Courts to be applicable to Southern India in regard to adoptions by a Hindu widow must be held applicable in this State. I think also for the reasons given by my learned colleagues that, in the present case, the widow adopted the defendant Krishnasawmy as by authority of her husband given to her under his will and that the will empowered her to make several adoptions for the purpose of continuing the testator's lineage and estate. The only material question for consideration, the question on which my learned colleagues differ, is whether the widow of Bakshi Narasappa went beyond the scope of that authority in adopting Krishnasawmy ?

The terms of the will are so far plain that it was the intention of the testator to make an adoption or if he failed to do so, to authorize his wife to make an adoption of a child fit and becoming his family in the first place from among the agnates; if none should be available among them, then to make an adoption of another relation. In so far as they are plain, these words must be held as mandatory to his wife.

At the same time, it appears to me equally plain, that the testator left absolutely to her discretion to decide what boy was suitable for adoption by her. He declares by his will that she is "given permission by me with my free will to take and adopt another boy fit and suitable to our family " on the failure on the first, that she "is at liberty to make adoptions," that "nobody shall raise any objections in this respect" or "to her acting in this manner," that "she may freely do these things." It is difficult to see what more words he could use to express his wish that her power of selection should be absolutely free. I think, therefore, that she had an absolute and unrestricted right to determine within the limit of relations and not merely agnates, who was a boy suitable for adoption. In the deed of adoption she recited that she made the adoption in accordance with the direction of her husband in his will. She purported therefore, to exercise her discretion as to what boy was suitable in accordance with the will and that will: allowed her to select the defendant Krishnasawmy and adopt him if she did not consider a boy from among the agnates suitable. I think there-

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fore, that she adopted him within the scope of the authority given to her by the will.

If the contrary view be taken, that is, if it be held that the right of the widow to decide who is suitable, be capable of question, it appears to me that there can be no satisfactory decision. In the present case, the plaintiffs set up that the sons of the plaintiff Krishnamurthi Row and of his younger brother were available for adoption. The plaintiffs have been allowed to adduce evidence to show they were suitable by reason of their 'good health and sound sense.' The learned District Judge has held that, in the absence of evidence to the contrary given by the defendants it must be assumed that they were quite suitable for adoption. But what reason is there for assuming that the testator meant by desiring the adoption of a suitable boy merely that he should be possessed of good health and sound sense? There is none. According to no Hindu text that has been quoted are good health and sound sense the sole requisites for an adopted son to be held suitable According to Manu pages 141, 142 and 168, he must be possessed of 'all good qualities,' 'a son, in distress, similar, endowed with affection.' Then who is to judge of the sufficiency or degree of these qualities? How are the sapindas, how is the Court to judge of their sufficiency or degree and by what standard? Obviously, it is impracticable for them to do so. And by the terms of the will in the present case, no objection can be raised to the choice and selection of the testator's wife. It is still (except in the Bombay Presidency, I. L. R., Bom., XXII p. 558) open to question whether the motive which operates upon the mind of a widow in making an adoption can be material upon the question of its validity (Mayne's H. L. VIth Ed., para 128). But in this case it is not alleged that the widow acted from capricious or corrupt motives. It is not alleged in the plaint that the son adopted by her was not suitable, but that the plaintiffs' sons and nephews were suitable for adoption in the opinion of the plaintiffs. There is no authority for holding that the exercise of the adopting widow's discretion merely as to the suitability of a boy to be adopted can be questioned. On the contrary, her discretion appears to be absolute and can neither be supplied nor controlled by any one else (authorities cited in para 119, Mayne's H. Law, 6th Edition).



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Taking this view, I do not think it necessary to come to a decision on the other questions referred to the Full Bench.

Since my two learned colleagues, themselves Hindus, have differed as to the legality of the adoption, I think each party should pay his own costs of both Courts. The appeal will be allowed and the suit dismissed.

## APPELLATE CIVIL.

*Before Mr. Justice A. Rangaswami Iyengar and Mr. Justice H. V. Nanjundayya.*

1904. December 9.

CHICKA HONNAYYA, APPELLANT, (PLAINTIFF)

*v.*

CHENNAMMA AND 5 OTHERS, RESPONDENTS, (DEFENDANTS).*

*Civil Procedure Code, section* 111—*Mortgage—Waste committed by mortgagee in possession—Suit by mortgagee for money—Mortgagor's right to claim a set-off for damage done to mortgaged property—Separate suit not necessary.*

In a suit by a mortgagee for money, the mortgagor's representatives alleged that the plaintiff had wantonly done damage to the mortgaged property and claimed a set-off for the compensation due to them for such damage from him. The Munsiff allowed the set-off and dismissed the plaintiff's suit. In appeal, it was contended on behalf of the plaintiff that the defendants were not entitled to any relief in this suit.

*Held*, that the defendants were entitled to have the damage ascertained in this case alone and have the amount deducted from the mortgage debt and that they need not be driven to a separate suit.

*Ramunni* v. *Shanku, I. L. R.*, 10 *Mad.*, 367; *referred to.*

*Shiva Devi* v. *Jaru Heggade, I. L. R.*, 15 *Mad.*, 290, *followed.*

SUIT on a mortgage bond. The Munsiff dismissed the plaintiff's suit.

The plaintiff preferred this Regular Appeal.

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* Regular Appeal No. 23 of 1904-05 against the decree of the Munsiff of Tumkur in Original Suit No. 493 of 1903-04.

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CHICKA HONNAYYA v. CHENNAMMA.

Messrs *L. Sreenivasa Iyengar* and *C. S. Doraswami Iyer for the appellant.*

Mr. *K. T. Narasimha Iyengar* for the respondents.

Judgment.—The plaintiff sues for the recovery of Rs. 25, balance of principal, due under a deed of mortgage with possession, interest Rs. 3-5-0 and cost of repairs Rs 2.

The heirs of the deceased mortgagor plead that the plaintiff has been guilty of causing wilful waste of the mortgaged property and claim damages on account of waste.

The Munsiff dismissed the plaintiff's suit, holding that the loss payable on account of the deterioration of the premises exceeded the amount due on account of the mortgage.

The mortgage deed was executed on 26th November 1902 and purports to mortgage for Rs. 75 'a shop of 6 ankanams of mud-roofed and black-tiled shop.' It recites that the said shop is in dis-repair and that the mortgagor should get it repaired in 15 days, failing which the plaintiff might have the repairs carried out and recover the cost at the time of redemption. On 27th May 1903, the mortgagor paid Rs. 50 towards the principal and endorsed the same on the document, making the further stipulation that for the balance of Rs. 25 interest at Rs. 1½ per cent should be paid.

The defendant's 1st witness is the plaintiff. He says that the house was in disrepair at the time of mortgage, that he never erected a shed and that he and mortgagor's husband had taken down the tiles from the roof for safe custody. The 2nd witness is the daughter of the mortgagor and says that the plaintiff had, in the previous year, when the plague broke out, removed the whole of the superstructure and erected a shed therewith, and that the walls came down when there was heavy rain. The 3rd witness, a neighbour of plaintiff and an attestor of the mortgage deed, states that the plaintiff had removed all the tiles of the mortgaged house for his shed and that the house without a covering for the roof came down in the rains. The witness also explained that the tiles only wanted shifting at the time of mortgage and that this was referred to as a state of dis-repair. The 4th witness has given similar evidence, but has exaggerated the value of the house and has further admitted that

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the plaintiff brought back and left some of the tiles near the mortgaged house.

Thus, the evidence for the defendants appears to be indefinite and highly exaggerated. The stipulation in the document that the mortgagor should repair the house and the undertaking of the mortgagor to pay interest for the balance of the mortgage amount clearly show that the shop was unfit for occupation at the time of the part payment and that the mortgagor undertook to pay interest on the balance of principal in consequence. This is further confirmed by the notice Exhibit A given by the mortgagor promising to have the repairs carried out in 2 or 3 months and stipulating that, if the plaintiff wished to execute the same, he should do so in the presence of some one on behalf of the mortgagor. Such discussions would not have been required if the roof required only turning of the tiles. Moreover, it is proved that the house or shop consisted of 4 mud roofed ankanas and 2 tiled ankanas. The 2nd witness alone says that the superstructure was removed. It is very unlikely that the materials of the mud roof can be used for a tiled shed and the evidence of the other witnesses that tiles only were taken is more probable. But as regards the extent of damage done thereby, the evidence of the plaintiff's 3rd witness who appears to be a disinterested person is more sober and worthy of credit. He says that the 4 ankanas of mud-roof and ½ ankana of tiled-roof have come down and that 1½ ankanas of the latter are still intact. Whether any portion of the building was standing at the time of suit or enquiry, should have been ascertained. But the Munsiff misread the allegation in the plaint that the shop was in ruins (or *Palu Biddide*) as meaning that it had become a vacant site and accepted the evidence of the defendant's evidence as literally correct. The real truth appears, however, to be that the mud-roofed portion fell down for want of repair and that the plaintiff contributed to the coming down of some of the tiled-roof by taking away the tiles for use in the shed which he put up on account of plague. There were only 2 ankanams of tiled house aud of this only ½ the ankana is said to have come down. The two tiled ankanas were valued at 20 or 25 Rs. and the utmost that the plaintiff can be held answerable for cannot exceed 15 Rs. when it is borne in mind that the shop was already in disrepair and that when repairs are neglected, such flimsy buildings are apt to

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deteriorate rapidly. The next question is one of law, whether the defendants can claim a set-off in this suit on account of damages. The Advocate for the appellant relied on *Raghu Nath* v. *Ashraf*, 2 All., 252 (1879) and contended that defendants should institute a separate suit. But this was not approved by the Madras High Court in (1891) *Shiva devi* v. *Jaru* 15 M. 290, and the learned author in Ghose on mortgage questions if it ever was law. See note at page 634 of the 3rd edition. The law on the subject as enunciated by him is that "If the mortgagee fails to perform any of the duties which the law imposes upon him, he will be debited when the usual accounts are taken with any loss sustained by the mortgagor, and it seems that this may be done at any time before the foreclosure becomes absolute." And the English case of *Taylor* v. *Mostyn* (1886) 33 Ch. D., 226 is quoted in support of it. In *Ramunni* v. *Shanku* (1884) 10 M. 367, it was laid down on the authority of *Weatherington* v. *Bankes* that "a mortgagee in possession is liable for waste, and if waste is proved, the mortgagor is entitled to have an account taken and the value of the damage deducted from the mortgage debt." Thus, the defendants are entitled to have the damage ascertained in this case alone and deducted from the mortgage debt and need not be driven to a separate suit.

Though, according to the endorsement on the mortgage document, the plaintiff is entitled to claim interest on the amount of Rs. 25 still due, yet as he caused damage to the mortgaged property soon after such endorsement almost equal to the amount due, no interest need be allowed. The loss from waste having been fixed at rupees fifteen, the plaintiff will be given a decree for Rs ten with proportionate costs in both Courts and interest on Rs. ten at 6 p. c. from date of suit. The defendants will get proportionate costs on the amount disallowed. 3 months' time will be given to the defendants to pay the decree amount and in default, the amount may be realized by the sale of the mortgaged premises.

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## APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

1904. December 14.

A. C. DEVARAJA URS, APPELLANT, (DEFENDANT No. 7)

*v.*

HANUMANTIA MAISTRY AND 3 OTHERS, RESPONDENTS, (PLAINTIFF AND DEFENDANTS NOS. 4, 5 AND 6).*

*Hypothecation—Interest after due date—Property made liable for principal and interest till repayment—Interest from date of decree to date of payment—Liability of hypothecated property therefor—Civil Procedure Code, section* 209*—Indian Limitation Act, Schedule II, Article* 116.

In a suit for money due on a hypothecation bond, the lower Court passed a decree awarding plaintiff interest on the balance of principal at the rate stipulated in the document up to date of suit, further interest thereon at 12 per cent per annum from date of suit to date of decree and also further interest thereon from date of decree to date of payment against the hypothecated property. The purchaser of the hypothecated property who was defendant No. 7 in the case contended in appeal that the lower Court erred in awarding interest after due date and in making the properties liable therefor and that the lower Court should not have decreed interest at 12 per cent per annum from the date of suit and further interest from the date of the decree against the hypothecated properties.

*Held*, that under the document the stipulation for payment of interest was unlimited and the property was hypothecated generally for the amount which might become due and therefore the interest stipulated must be considered to be due till payment of principal and the property hypothecated for the total amount.

*Narindra Bahadur Pal* v. *Khadim Husain, I. L. R.*, 17 *All.*, 581; *Rikhi Ram* v. *Sheo Parshan Ram, I. L. R.* 18 *All.*, 316; *Gudri Koer* v. *Bhubaneswari Coomar Singh, I. L. R*, 19 *Cal.*, 19, *distinguished.*

*Held further*, that in the present case as the property was hypothecated for principal and interest thereon till payment, there was nothing in section 209, Civil Procedure Code, to prevent the Court from making interest till payment a charge upon the property in accordance with the agreement between the parties.

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* Regular Appeal No. 27 of 1903-04 against the decree of the Sub-Judge of Bangalore in Original Suit No. 583 of 1901-02.

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*Bhawani Prasad* v. *Brij Lal*, 16 *All.*, 269, *not followed.*

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SUIT on a hypothecation bond. The Sub-Judge of Bangalore passed a decree in favour of plaintiff for principal and interest against the hypothecated properties and for costs against defendant No. 7.

The defendant No. 7 preferred this Regular Appeal.

Mr. *M. B. Varadaraja Iyengar* for the appellant.

Mr. *Lakshmana Gowda* for Mr. *B. Nagappa* for respondent No. 1.

Mr. *S. Narayana Rao* for respondent No. 3.

Mr. *K. Ramaswami Iyengar* for respondent No. 4.

JUDGMENT—THE CHIEF JUDGE:—This is an appeal by the 7th defendant, a purchaser of some hypothecated property against certain terms of a decree, allowing the suit of plaintiff upon the mortgage bond dated the 8th September 1892, executed by defendants 1, 2 and 3. The first ground taken in appeal is, that the original Court has failed to decide whether Rs. 1,000 were repaid as the defendant No. 2 has pleaded on the date of the mortgage bond or on the 10th January 1893 as the plaintiff admits.

There was an issue drawn among others as to what is the balance due to plaintiff on the deed of hypothecation in suit. This issue was sufficient to allow the defendants under it to prove if they wished that a payment of Rs. 1,000 on principal account was paid on the 8th September 1892. The defendants adduced no evidence on the point. The appellant did not even cross-examine the plaintiff or his witnesses on this point. It must be taken therefore that they abandoned the plea, a plea which, it may be observed, the appellant did not himself take or urge at all in the original Court.

It is next urged that the bond did not provide for interest after due date of two years from the date of execution; that consequently interest would thereafter only be due by way of damages for breach of contract in respect of which the plaintiff's suit is barred by the provisions of Art. 116, schedule II, Limitation Act 1877. In support of this contention, the rulings, I. L. R., 17, Allahabad page 581; I. L. R., 18, Allahabad 316, and I. L R., 19, Calcutta p. 19, are relied on; and also to support the contention that such damages do not

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constitute a charge on the mortgaged property. The question has to be decided whether, on the construction of the agreement, the interest arises by way of damages or as interest under the contract (I. L. R., 24 Calcutta, 699). In this respect the operative words of the bond in suit are as follows:—"This day we have borrowed of you 3,000 Rs. We promise to pay interest on this amount at the rate of one per cent per mensem from this date. For this amount we have hypothecated to you the built house and the vacant site . . . . . Within two years from this date whenever convenient to us, we shall return your hypothecation amount and take back this document. In default of payment of the amount within the stipulated period, the same may be recovered from the said properties . . . " The stipulation for payment of interest on the principal amount was thus unlimited. There was no stipulation for payment of interest merely to due date and for payment of that interest on that date as in the cases to which the rulings cited (I.L.R., 17 Allahabad p. 581; I.L.R., 18 Allahabad p. 316 and I.L.R., 19 Calcutta p. 19) refer. The properly was hypothecated generally for the amount which might become due. On the construction of the contract therefore the interest stipulated must be held due till payment and the property hypothecated for the total amount, and the appellant's contention on this point fails.

It is next urged that the orignal Court should not have decreed interest at 12 per cent per annum from the date of suit and further interest from the date of the decree against the hypothecated property. The order for payment of interest to and after decree was properly passed under section 209 of the Civil Procedure Code. There is a ruling, I.L.R., 16 Allahabad p. 269, that interest subsequent to the decree cannot be charged upon the mortgaged land in a foreclosure suit but must be realized from the defendant personally. That decision was passed in a suit under the Transfer of Property Act which does not extend to this State and which provides for an order of sale of the mortgaged property in default of payment of the amount due within a period to be fixed by the Court. It was held that section 209 of the Civil Procedure Code does not provide for making interest after date of the decree a charge upon the land. But in the present case the property was hypothecated for the principal and interest thereon till payment and interest was not

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payable merely to date of the decree under the Transfer of Property Act. There was thus no reason why the Court should not pass a decree in accordance with the agreement and there is nothing in the terms of section 209 to prevent the Court making interest till payment a charge upon the property in accordance with an agreement. Then, it has been urged for the 7th defendant, appellant, that the original Court has wrongly directed that the plaintiff's costs be recovered from the appellant and the hypothecated property. It is difficult to understand and the record does not disclose why the appellant has been made solely liable for the whole of the plaintiff's costs, Rs. 428-12-1. The suit was to recover 2,000 Rs., principal and and Rs. 1,800 interest on the bond in suit. Of this, Rs. 2,000 were in deposit with defendant No. 6 for payment to the plaintiff, the deposit having been made by defendants 4 and 5, who were themselves purchasers from the mortgagors (defendants 1, 2 and 3) and were vendors to the vendor of appellant defendant No. 7. The plaintiff in the course of the trial withdrew his suit against defendant No. 6 having received the amount of deposit, 2,000 Rs. This was after the defendant No. 6 had appeared and stated that the money was in deposit with him for payment to the plaintiff only on condition that plaintiff should return the mortgage deed duly discharged with any title deeds. There was no unconditional tender by defendants 4 and 5 or 6. But there is no reason for making the appellant defendant No. 7 liable for plaintiff's costs in respect of this sum when the plaintiff withdrew his suit and when the condition of payment was not made by defendant No.. 7. Then, the defendants 1, 2 and 3 did, as a matter of fact, appear and oppose the suit on certain grounds though they did not oppose the suit on the main grounds. Apparently, therefore, it is not just that defendant No. 7 should be made personally liable for the whole of plaintiff's costs. Nor is it a proper order that he should be made liable for costs whether or not the hypothecated property be sold and yield sufficient to pay the costs of the suit. On the other hand, the appellant was the principal contesting defendant, and he has not made the defendants 1, 2 and 3 respondents in this appeal. I think that defendants 4 and 5 by whose action the plaintiff was obliged to bring this suit in respect of 2,000 should be liable personally for



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20/38 of plaintiff's costs in the original Court, and defendant No. 7 liable personally in respect of the balance in that Court after deduction of such costs as may be realized from sale of the mortgaged property.

In respect of the same sum of 2,000 it has been objected that, had plaintiff received the money when deposited with defendant No. 6, there would have been no accumulation of interest on that amount. But since there was no unconditional tender, the plaintiff was not bound to receive that amount before suit. The result is that except, as to the order of costs, the appeal will be dismissed. The appellant will pay costs of the plaintiff and defendant No. 6 respondents in this appeal and defendants 4 and 5 and the appellant as between themselves will pay their own costs in this appeal.

Mr. Justice A. RANGASWAMI IYENGAR :—I agree.

## APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

1904. December 15.

N. RAMA ROW, APPELLANT, (PLAINTIFF)

v.

PUTTIAH, RESPONDENT, (DEFENDANT).*

*Civil Procedure Code, section 43—Suit by a Jodidar for possession of Inam lands in his village—Dismissal of suit—Subsequent suit by Jodidar's son for recovery of kandayam from Inam holder—Survey Settlement introduced into an alienated village—Effect.*

In 1885 the plaintiff's father sued for possession of some lands from defendant, alleging that the defendant held the lands on condition of paying the jodi and rendering some services and that he had failed to do so. In that suit it was decided that the condition alleged in the plaint was not true and that the defendant held the lands rent-free. This decision was confirmed, in appeal, by the Chief Court. In February 1904, the plaintiff brought the present suit for a declaration of his right to receive jodi from the defendant and also for the recovery of arrears of assessment alleging that when the Survey Settlement was introduced into his village in 1896, the defendant failed to prove the lands to be his Inam lands.

* Regular Appeal No. 81 of 1904-05 against the decree of the Additional Munsiff of Bangalore in Original Suit No. 580 of 1903-04.

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*Held*, that the plaintiff's right to recover kandayam or jodi from the lands in dispute was barred by section 43 of the Civil Procedure Code.

*Held further*, that merely by the introduction of Survey Settlement, the owner of an alienated village could not evade or alter the obligations he had previously incurred with reference to individual holdings either by agreement or operation of law.

*Dodda Venkatiga* v. *B. Venkatiga*, 15 *Mys. L. R.*, 208, *referred to.*

SUIT for a declaration of right to recover kandayam from defendant and for recovery of arrears due by him. The Additional Munsiff of Bangalore dismissed the plaintiff's suit on the ground that it was barred by *res judicata.*

The plaintiff preferred this Regular Appeal.

Mr. *C. S. Doraswami Iyer* for the appellant.

JUDGMENT.—The particulars of claim are fully set out in the first para of the Munsiff's Judgment and need not be repeated. The plaintiff admits that his father had sued for the recovery of the lands in dispute in O. S No. 626 of 1885 on the file of the Bangalore Munsiff and that the suit had been dismissed. In that suit, the plaintiff's father had alleged that the defendant and his predecessors held the land on condition of paying a jodi of 6 pagodas and rendering certain services and that, as he failed to pay the jodi and to render the services, the plaintiff was entitled to get back the lands. The Munsiff found that the defendant had held the lands without payment of any jodi or rendering any service and dismissed the plaintiff's suit. It is true that, in para 12 of his judgment, the Munsiff says "Equally out of my province, is it to consider whether * * * the defendants can, on the other hand, claim total exemption from payment of jodi on the dry land, admittedly included in the plaintiff's village, for which plaintiff himself pays quit-rent to Government (*vide* Exhibit D). There are matters, with which I am not now called upon to deal, and regarding which, if plaintiff has any grievances, it is for him to address the Revenue Department, as advised by the Inam Superintendent in Exhibit B.'

Under section 43, para 1 of the C. P. Code, "a suit should include the whole of the claim which the plaintiff is entitled to make

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in respect of the cause of action." Para 3 provides that a person entitled to more than one remedy in respect of the same cause of action is bound to sue for all such remedies on pain of losing his chance of suing again for the remedy which he omitted to claim. The cause of action against the defendant in that suit was alleged to be that the defendants were enjoying certain lands in the plaintiff's jodi village without paying the jodi and rendering services to which they were liable. It was open to the plaintiff not only to ask for the recovery of the lands but also for such jodi or other relief as the plaintiff was in law entitled to. The plaintiff omitted to ask for any other relief and his present suit for jodi or quit-rent would therefore seem to be barred. The fact that the Munsiff held that it was not in his province to enquire whether the defendants were liable to pay any jodi on account of the lands and that it was a matter within the cognizance of the Revenue Department cannot operate to keep the plaintiff's right to such claim alive in spite of the provisions of section 43. If the Munsiff was wrong in his opinion, it was the duty of the plaintiff to have it set right in appeal.

It may be noted that the 2nd ground in appeal is worded as follows. "That the lower Court erred in holding that plaintiff forfeited his right to receive jodi from defendant" and the Chief Court, after referring to the Exhibits in which the defendant's denial of the right of plaintiff to levy jodi was denied, remarked as follows. " We agree with the Munsiff that the plaintiff has entirely failed to establish his right to recover jodi from the defendant or to eject from the suit lands." The words 'right to recover jodi' are wide enough to include the right based on alleged express contract as well as otherwise.

It may also be observed that Exhibit III, decision of the Deputy Commissioner, Bangalore District, dated 17th February 1900, refers to another decision of the Deputy Commissioner in Revenue Appeal No. 5 or 8 of 1893-94, dismissing the plaintiff's suit, on the ground that he failed to prove that he was receiving kandayam from defendant. Copy of this decision is not filed with the records and it is not possible to say whether it operates as any further bar to the present suit.

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It must therefore be held that as far as the plaintiff's right to recover kandayam or jodi from the lands in dispute on contract or general principles of law is barred by section 43 of the C. P. Code.

It has now to be considered whether the circumstance of the introduction of the Survey Settlement created any new right in favor of the plaintiff. Alienated villages are not liable to Survey and Settlement except on the application of the holders of such village under the last para of section 236, Land Revenue Code, and when such Survey Settlement is introduced, the Settlement Officer cannot do more than fix the amount payable by each Survey Number. He cannot enquire into or decide whether any particular land is held rent free from the holder of the alienated village or is liable to pay the full assessment imposed thereon. Even in unalienated villages, he can fix the assessment for land revenue only on lands not wholly exempt from land revenue (*see* section 111, L. R. Code). It would be unfair to hold that, merely by introducing Survey and Settlement, the owner of an alienated village can evade or alter the obligations he had incurred with reference to individual holdings either by agreement or operation of law. (*See* also 15, Mysore L. R. 208).

As regards local cess also, it is payable at a certain rate on the kandayam, jodi, or quit-rent paid by an occupant of land. But when he is held entitled to hold the land free of such jodi, kandayam or quit-rent, it follows that he is exempt from paying local cess thereon.

For these reasons, we are of opinion that the appeal must fail and that it must be dismissed.

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## APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

1904. December 20.

THIMMAROYAPPA, APPELLANT, (DEFENDANT No. 1)

*v.*

HANUMANTHA AND ANOTHER, RESPONDENTS, (PLAINTIFFS).*

*Indian Limitation Act, Schedule II, Article 134 – Mortgage—Purchase from mortgagee—Suit for redemption by original mortgagor's sons—Adverse possession of purchaser.*

A certain land was mortgaged by plaintiffs' father to R in 1878. The 1st defendant purchased the land from R's undivided father under a registered sale deed dated 11th April 1881. The original mortgagor's sons filed the present suit for redemption in February 1901 against the purchaser and other persons who were in possession of the land. The defence was that the suit was barred by limitation.

*Held*, that the plaintiffs' suit was time-barred under Article 134 of Schedule II of the Limitation Act and must be dismissed.

*Yesu Ramji Kalnath* v. *Balkrishna Lakshman, I. L. R.*, 15 *Bom.*, 583, *referred to.*

SUIT for redemption of mortgaged property. The Munsiff of Doddaballapur passed a decree in favour of plaintiffs.

The defendant No. 1 preferred this Regular Appeal.

Mr. *B. Nagappa* for the appellant.

Messrs. *L. Sreenivasa Iyengar* and *C. S. Doraswami Iyer* for the respondents.

JUDGMENT.—It is admitted that the land in dispute had been mortgaged in 1878 in the name of Raja Dodnanjappa by the deceased father of the plaintiff. The 1st defendant claims to have purchased it from Raja Lingia, the father of Dod Nanjiah under a registered sale deed (Exhibit II) dated 11th April 1881. He also says that Raja Lingia purchased the land from the 2nd plaintiff and became its Pattadar prior to the sale to himself.

* Regular Appeal No. 49 of 1903-04 against the decree of the Munsiff of Doddaballapur in Original Suit No. 626 of 1900-01.

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The Munsiff finds that the said document Exhibit II is genuine but that what was meant to be conveyed under it was the mortgage right, and that "it was written as a sale deed by the parties to it in order to defraud the plaintiffs."

The document clearly purports to be of a sale. The first question for consideration is therefore whether under Article 134 of schedule II of the Limitation Act, the plaintiff's suit is not time-barred. This is concluded by authority and it has been held that the omission of the words 'in good faith' from this Article in the Act of 1877 was advisedly made to exclude the possible inference that absence of notice of the limited title of the vendor was necessary to enable the purchaser to avail himself of this Article (*Yesu Ramji* v. *Balkrishna,* I. L. R. 15 Bom. 583). The Advocate for the respondent relied upon *Bhagwan Sahai* v. *Bhagwan Din,* I. L. R. 9 Allahabad 97 to shew that this Article was not applicable to the present case and he urged that the 1st defendant purchased only the interest of a mortgagee. But there is no reason for this contention as the document does not refer to the mortgage and as it purports to convey all the rights of an absolute owner to the 1st defendant.

This finding renders it unnecessary to consider whether the oral sale and transfer of warg of the land by the 2nd plaintiff alleged by the 1st defendant have been proved or not.

The objection of the respondents regarding the refusal to award damages to the plaintiffs also fails.

The decision of the Munsiff is set aside and the suit of the plaintiffs is dismissed with costs throughout.

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## APPELLATE CIVIL.

*Before Mr. Justice A. Rangaswami Iyengar and Mr. Justice H. V. Nanjundayya.*

1904. December 23.

NANJUNDA PANDITHA, APPELLANT, (DEFENDANT)

*v.*

NARASIMHA BHATTA AND 2 OTHERS, RESPONDENTS, (PLAINTIFFS).*

*Mortgage—Redemption—"Upakshaya Viradha," meaning of—Mortgagor undertaking to bear such charges—Jodi or land tax—Mortgagor's liability to pay jodi at the time of redemption.*

In a suit for redemption the mortgagee claimed re-imbursement for the jodi amount paid by him to Government for the mortgaged property.

*Held* that the words 'Upakshaya Viradha' did not include such a charge as land-tax or jodi which was an obligation attached to the holding but only referred to casual or additional rates and subscriptions that might be imposed.

*Held further*, that the wording of the passage also showed that the mortgagor referred to charges that would be newly imposed and not to the burden of paying the jodi which was meant to be cast on the mortgagee when the property was given over to his possession and therefore the mortgagee was not entitled to the claim put forth in his written statement.

SUIT for redemption of two-thirds of the mortgaged property. The Munsiff of Doddaballapur granted the plaintiff a decree for the redemption of one-third of the property and disallowed the defendant's claim for repayment of the jodi amount.

The defendant preferred this Regular Appeal.

Messrs. *B. Nanjundappa* and *S. Ranganna* for the appellant.

Messrs. *D. Venkataramayya* and *M. Ramachandra Rao* for the respondents.

JUDGMENT.—The plaintiffs claimed to redeem ⅔ of 2¼ vrittis, but the Munsiff allowed the claim only so far as it related to a third share. This finding is not objected to by the respondents. The appellant's contention is that the suit ought to have been dismissed, or that at any rate all the sums claimed in the written statement should have been awarded to them before allowing the plaintiff to

* Regular Appeal No. 170 of 1903-04, against the decree of the Munsiff of Doddaballapur in Original Suit No. 15 of 1902-03.

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redeem. There was nothing urged to show that the suit was not maintainable, or that as the plaintiff failed to make out a title to ⅔ of the property, the one-third to which he did make out his claim, should also be denied to him.

The Munsiff has decreed that the plaintiffs might redeem one-third of these 2½ vrittis on payment of one-third of the original mortgage debt Rs. 30-1-3 (this ought to be 29-15-7, but the difference is trifling) and Rs. 7-1-11 one-third of expenses of repairing a tank included in Exhibit XII, which he makes together (slightly mistaking the total) Rs. 37-1-2. The appellant has nowhere in his evidence or written statement clearly explained how he arrives at the figure Rs. 731-13-11 which is what he claims in his written statement. The chief contention urged here as well as in the lower Court is whether the jodi amount should be paid by the mortgagor or mortgagee. If nothing is mentioned in the bond, the proper presumption would be that the mortgagee with possession pays the Government dues and enjoys the nett profits as his interest. The appellant wishes to bring the liability to pay jodi under the mortgagors undertaking to bear any ಉಪಕ್ಷಗ.ವಿಾದ that may occur (ಯಿಂದು ಕೂ ಉಪಕ್ಷಗಃವಿಧಾತಾಲು ಯೇವಿ ಗಲಿನಾ ವಃಾಲಕತಃನಲ್ಲೇ ಆಚ್ಛ ಗಲವಾರು). These words as far as we can make out, do not include such a charge as land-tax or jodi which is an obligation attached to the holding, but seem to refer to casual and additional rates and subscriptions that may be imposed. The wording of this passage also shows that the mortgagor referred to charges that would be newly imposed, and not to the burden of paying the jodi, which was meant to be cast on the mortgagee when the property was given over to his possession professedly as out of a "jodi village.' The liability to pay jodi includes in our opinion the liability to pay any enhanced amount (Rs. 1-10-10 a year in this case) that may be legally imposed at the Inam settlement.

The appeal therefore fails and is dismissed with costs.



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## APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

1904. October 6.

CUNDASAWMI MODLIAR, APPELLANT, (PETITIONER AND SURETY)

*v.*

B. NARASIMHIA CHETTY, RESPONDENT, (COUNTER-PETITIONER AND PLAINTIFF).*

*Civil Procedure Code, section 258—Execution of decree against surety—Security given before the passing of decree—Decree allowing defendant to pay by instalments—Surety's liability whether affected by such decree—Indian Contract Act, section 135.*

A surety against whom a decree was sought to be executed, presented a petition alleging that the decree which was passed in the case after he executed the security bond, gave time to the defendant for payment of the decree amount without his knowledge and that he was thereby discharged from liability under section 135 of the Indian Contract Act. The lower Court dismissed the application.

*Held,* that as the security bond did not make any stipulations as to the terms of the decree and also as section 258 of the Civil Procedure Code did not make any distinction as to the nature of the decree, the order of the Munsiff dismissing the surety's application was correct.

MISCELLANEOUS application preferred by a surety. The Munsiff dismissed the application.

The surety preferred this Miscellaneous Appeal.

Mr. *J. C. S. Laurance* for the appellant.

Mr *C. Krishna Murti* for the respondent.

ORDER.—In this case, a sum of Rs. 1,500, belonging to 1st defendant in the hands of the Superintendent of the Balaghat Mines, was attached on 11th June 1903 before judgment at the instance of the plaintiff. The 1st defendant presented a petition on

* Miscellaneous Appeal No. 15 of 1904-05, against the order of the Munsiff of Kolar Gold Fields in Miscellaneous Case No. 26/Execution Case No. 44 of 1904-05.

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the same date, stating that he was ready to produce security for the attached money and requesting that it might be released from attachment. On the same day, the Munsiff passed an order that "the attachment will be raised on defendant furnishing sufficient security." The appellant and two others executed a security bond on the same day, binding themselves to pay the amount of the decree that may be passed in the case on the failure of the said defendant to pay the same. The Munsiff made the endorsement on this bond that the security was furnished and that release warrant should issue. On 17th February 1904, the plaintiff and 1st defendant filed a razinama and the Munsiff passed a decree against both defendants for the whole amount payable by instalments of 50 Rs. The 1st defendant having failed to pay the instalments, the plaintiff applied for execution against the appellant according to the security bond and the Munsiff granted his prayer.

It is urged in appeal that the appellant is absolved from his liability, inasmuch as the decree directed the payment of the amount by instalments, thus giving time to the judgment-debtor without the knowledge of the surety. In support of this argument, section 135 of the Contract Act is cited. This provision cannot apply to this case. The security bond provided that the appellant should be liable to satisfy the decree in default of the first defendant and did not make any stipulations as to the terms of the decree. The plaintiff was no party to the bond entered into by the appellant with the Court and it cannot be maintained that plaintiff gave time to the first defendant or showed any concessions to him contrary to section 135. The provisions of section 253 clearly lay down that, when a person has, before the passing of a decree, become liable as surety for its performance, the decree may be executed against him as if he were a defendant. The section does not make any distinction as to the nature of the decree.

The order of the Munsiff is therefore affirmed and this appeal is dismissed with costs.

Advocate's fee 10. Rs.

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## APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice H. V. Nanjundayya.*

1904.
October 18.

MAHOMMED HUSSEIN, Appellant, (Plaintiff)

*v.*

NANJA, Respondent, (Defendant)*

*Land Revenue Code, (Regulation IV of* 1888), *section* 229—"*Officer of Government*"—*Nirganti of a village—Suit for damages for a tortious act against a Nirganti—Jurisdiction of Munsiff.*

In a suit for damages filed against a Nirganti, the Munsiff passed an order returning the plaint on the ground that a Nirganti was an 'officer of Government' within the purview of section 229 of the Land Revenue Code and that he had no jurisdiction to entertain the suit.

*Held*, that the words 'Officers of Government' used in section 229 of the Land Revenue Code applied only to Revenue Officers as defined in the Code and that a Nirganti, though he was generally under the control of the Revenue Department, could not be regarded as employed in or about the business of Land Revenue and that the order of the Munsiff returning the plaint must therefore be set aside.

*Hanumanthappa* v. *Srinivasa Row*, 15 *Mys. L. R.*, 243; *Shroff Runga Row* v. *Edigara Narasimha Gowda*, 2 *Mys. Ch. Ct. R.*, 151, *referred to.*

Suit for damages. The Munsiff of Tumkur returned the plaint for presentation to the proper Court.

Against that order the plaintiff preferred this Miscellaneous Appeal.

Mr. *N. Cheluva Iyengar* for the appellant.

Messrs. *B. Nanjundappa* and *S. Ranganna* for the respondent.

Order.—The defendant is the Nirgunte of the tank situated in the village of Kitnamangala, Kunigal Taluk. The allegations

* Miscellaneous Appeal No. 11 of 1904-05 against the order of the Munsiff of Tumkur in Original Suit No. 682 of 1903-04.

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are that incited by the plaintiff's enemies, the defendant omitted to let water into plaintiff's lands and also closed up the opening in the channel through which water had to flow. The Munsiff has returned the plaint on the ground that a Nirgante is an Officer of Government within the purview of section 229 of the Revenue Code. It has been decided by a Full Bench of this Court that this provision applies only to Revenue Officers as defined in the Code. (*Hanumanthappa* v. *Srinivasa Row,* 15 Mys. L. R., 243).

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MAHOMMED HUSSEIN v. NANJA.

Though Nirgunte is generally under the control of the Revenue Department, we do not think that he can be regarded as employed in or about the business of Land Revenue. In *Shroff Runga Row* v. *Edigara Narasimha Gowda,* 2 Ch. Ct. R. 151, it was held that a Saraff was not a Revenue Officer under this definition; and in the Full Bench Case already cited, an officer of the Engineering department was held not to be within the purview of section 229. A Nirgunte who is a village servant employed in the distributing of water of a tank for irrigation, cannot be held to be more intimately connected with the business of land revenue than an official of the P. W. or the Treasury department.

The alleged acts, moreover, are said to have been done not in the defendant's capacity of a public servant; but the plaintiff seeks to hold him liable for the commission of a tort.

The Munsiff's order, returning the plaint, is therefore set aside, and he will take the case on the regular file and dispose of it on the merits. The costs will be costs in the suit.

Fee 10 Rs.

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## APPELLATE CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

1904. November 17.

MUNE GOWDA, APPELLANT, (PETITIONER)

*v.*

DODDA RAMANNA, RESPONDENT, (2ND COUNTER-PETITIONER).*

*Civil Procedure Code, section 344—Insolvency application—Burden of proof.*

Under section 344 of the Civil Procedure Code, a judgment-debtor applied to be declared an insolvent and the lower Court rejected the application on the ground that he was not entitled to be so declared. In appeal, the judgment-debtor contended that the lower Court should have granted his prayer as he had not committed any act of bad faith with regard to his creditors.

*Held*, that it was for the petitioner in the first instance to prove that he was insolvent and that as he had not proved that he was insolvent or that his statements in his petition were substantially true, his application was rightly dismissed.

*Baldeo Das* v. *Sukhdeo Das, I. L. R.,* 19 *All.*, 125, *followed.*

INSOLVENCY APPLICATION. The Munsiff of Kolar rejected it. The petitioner (judgment-debtor) preferred this Miscellaneous Appeal.

Mr. *B. Ramanna* for the appellant.

Mr. C. *Krishna Murti* for the respondent.

ORDER.—This is an appeal against an order, dismissing the petition of the appellant to be declared insolvent.

2. The reasons given by the learned Munsiff for dismissing the petition were these. The opposing creditor adduced evidence to show that immoveable property still in appellant's name was still in appellant's enjoyment and that appellant has property which appellant has not scheduled in his petition. The appellant adduced no rebutting evidence. In the next place, the Munsiff has found that the appellant, when sued by one Venkatramana whose decree has been assigned to the second counter-petitioner, falsely pleaded

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* Miscellaneous AppealNo. 16 of 1904-05, against the order of the Munsiff of Kolar in Miscellaneous Case No. 568 of 1901-02.

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MUNE GOWDA v. DODDA RAMANNA.

payment to Venkatramana and assigned a number of properties to one Venkatappa for the paltry sum of Rs. 50 to prevent proceedings against those properties. In appeal, it is urged that it has not been proved that the appellant committed any act of bad faith which would justify the refusal of his petition.

3. The petitioner has deposed that he received the proceeds of some lands sold by him after he incurred the debts but cannot remember to whom he made payments. His inability to recollect to whom he paid away the sale proceeds discredits his testimony. The counter-petitioner Dodda Ramanna and three witnesses deposed that the petitioner is in possession of lands and cattle to a considerable amount. The petitioner adduced no evidence to corroborate his own; and no reason appears for disbelieving the evidence against him.

4. The counter-petitioner's 2nd witness (2nd counter-petitioner) has deposed that 2 fields and 1 garden referred to in the sale deed were worth 300 Rs.

3rd witness says that the mango garden may be worth 100 or 150 Rs., the two houses more than 100 Rs., and the fields about 2 or 300 Rs.

4th witness deposes that the mango tope was worth about 150 Rs., the 2 wet fields 50 Rs. and the dry fields about 500 Rs.

From the above, it is clear that the property was sold for an insufficient price and as the sale deed was registered only after the suit was filed by the assignor of decree to counter-petitioner; though the date of sale is anterior to the sale, there is room to infer that the sale was not *bona fide*.

5. We consider that it is for the petitioner in the first instance to prove that he is entitled to the benefit of Chapter XX of the Code of Civil Procedure, that is, that he is insolvent. We agree with the views expressed by the High Court of Allahabad on this point in the case of *Baldeo Das* v. *Sukhdeo Das*, I. L. R., 19 All., p. 125. We consider that the petitioner has not proved that he is insolvent or that the statements in his petition are substantially true. The appeal is dismissed with costs.

Advocate's fee Rs. 10.

## APPELLATE CIVIL.

*Before Mr. Justice A. Rangaswami Iyengar and Mr. Justice H. V. Nanjundayya.*

K. MALLIKARJUNAPPA AND ANOTHER, APPELLANTS, (DEFENDANTS)

*v.*

1904. December 24.

B. HERAMBA RAO, SINCE DECEASED, BY HIS WIDOW AND LEGAL REPRESENTATIVE; GOWRAMMA, RESPONDENT, (PLAINTIFF).*

*Excise Regulation—Farmer of arrack revenue—Transfer of arrack farm—Partners—Right of a contractor to admit partners—License—Construction.*

The plaintiff and one B took up an arrack contract in the latter's name. After some time, B assigned all his interest in the contract in favour of plaintiff but it was agreed between them that the license should continue to remain in B's name. In a suit brought by plaintiff to recover money from some persons employed in the business, the latter contended that the assignment of the arrack contract in favour of plaintiff was illegal and that the present suit was not therefore maintainable.

*Held*, that in the present case there was no transfer of the arrack farm in favour of plaintiff since B continued as contractor with Government

There was nothing in the Excise Regulation or in the terms of the license against an arrack contractor admitting partners.

The terms of the license should be construed literally and strictly as they were in restriction of the free action of contractors.

SUIT for money. The plaintiff alleged that he and one Bharmaiya were both arrack contractors, that Bharmaiya transferred his interest in favour of plaintiff for some consideration and that the defendants who were his gumastas employed in the contract business were liable to pay over to plaintiff the moneys which were in their possession. One of the defendants contended that the assignment of the arrack contract to plaintiff by Bharmaiya who was the license-holder was against law and that the plaintiff's suit which was based on such illegal assignment was not maintainable. The Munsiff of Sagar upheld the contention of the defendants and dismissed the suit. In appeal, the District Judge of Shimoga being of opinion that there was no transfer of the arrack farm in favour of plaintiff, remanded the case to the lower Court for a decision on merits.

Against that order of remand, the plaintiff preferred this Miscellaneous Appeal.

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* Miscellaneous Appeal No. 17 of 1904-05 against the order passed by the District Judge of Shimoga in Appeal No. 141 of 1901-02 remanding for disposal on merits Original Suit No. 201 of 1901-02 to the Court of the Munsiff of Sagar.

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Mr. *M. B. Varadaraja Iyengar* for the appellants. 1904.

Mr. *S. Narayana Rao* for the respondent.

MALLIKARJUNAPPA v. HERAMBA RAO.

ORDER.—As observed by the learned District Judge, there was no transfer of the arrack farm in favour of plaintiff. Bharmiah continued as contractor under Government and left the management with plaintiff as sole manager. There is nothing either in the Excise Act or in the terms of the license against a farmer taking partners. The terms of the license have to be construed literally and strictly as they are in restriction of the free action of contractors. We see therefore no reason to interfere with the order of remand of the case for further enquiry on the merits. We are not, however, inclined to decide the question at issue finally at this stage. The costs of this appeal will be costs in the case. The Advocate's fee will be Rs. 10.

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## REVISIONAL CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge.*

1904. November 29.

VENKETESAPPAH, PETITIONER, (PETITIONER)

*v.*

CHANDRAPPAH, COUNTER-PETITIONER, (COUNTER-PETITIONER).*

*Civil Procedure Code, sections 156, 622—Interlocutory order passed in an appealable case—Application to revise such order—Revision.*

The defendant in a certain suit applied to the Munsiff to stay proceedings till the disposal of an appeal which was pending in the Chief Court and the Munsiff declined to grant the prayer. On revision,

*Held*, that the present petition being one to revise an interlocutory order in a suit, in which, if the decree be against the petitioner, he would have a right of appeal, it could not be entertained under section 622 of the Code of the Civil Procedure.

*Motilal Kashibhai* v. *Nana* alias *Langda Mukund Patil, I. L. R.,* 18 *Bom.,* 35, *followed.*

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* Civil Revision Petition No. 17 of 1904-05, praying that the proceedings in Original Suit No. 357 of 1901-02 on the file of the Munsiff of Chikaballapur may be ordered to be stayed or the suit adjourned until the disposal of Appeal No. 8 of 1904-05 on the file of the Chief Court.



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1904.

VENKETESAPPAH v. CHANDRAPPAH.

APPLICATION to stay proceedings or to grant an adjournment under section 156, Civil Procedure Code. The Munsiff of Chikaballapur rejected it.

The petitioner preferred this Civil Revision Petition.

Mr. *B. Nanjundappa* for the petitioner.

Mr. *C. Krishna Murti* for the counter-petitioner.

ORDER.—This is an application under section 622, Civil Procedure Code, for revision of an order under section 156, Civil Procedure Code, refusing to stay proceedings and grant adjournment in a suit to which the petitioner is a party, pending the disposal of an appeal in another suit, to which petitioner is a party on which appeal his title, he alleges, depends. It is thus an application to revise an interlocutory order in a suit in which, if the decree be against him, the petitioner will have a right of appeal against it. In such cases, an application under section 622 cannot be entertained (I. L. R., 18 Bombay p. 35 and cases referred to therein). The application is dismissed with costs.

Advocate's fee Rs. 10.

## REVISIONAL CIVIL.

1904. December 2.

*Before Mr. Justice A. E. Staley, Chief Judge.*

NEELAPPA, PETITIONER, (PLAINTIFF No. 1)

*v.*

SAMANNA AND 3 OTHERS, COUNTER-PETITIONERS, (DEFENDANTS).*

*Civil Procedure Code, sections 32, 622—Party to a suit—Refusal to add a party —Revision against order of refusal—Non-maintainability.*

In a suit for partition, the plaintiffs applied to the Court under section 32 of the Civil Procedure Code to make their father also a party to the suit on the ground that otherwise the suit may be open to the objection of non-joinder of parties. The District Judge rejected the application. On revision,

*Held*, that no application for revision against the order in question lay under section 622 of the Civil Procedure Code.

*Motilal Kashibhai* v. *Nana* alias *Langda Mukund Patil, I. L. R.*, 18 *Bom.*, 35, *followed.*

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* Civil Revision Petition No. 50 of 1904-05 praying that the records in Original Suit No. 14 of 1903-04 on the file of the District Judge of Shimoga may be sent for and revised.

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APPLICATION under section 32, Civil Procedure Code, to make plaintiffs' father a party to the suit was rejected by the District Judge of Shimoga. 1904.

NEELAPPA v. SAMANNA.

The plaintiff No. 1 preferred this Civil Revision Petition.

Mr. *C. Krishna Murti* for the petitioner.

ORDER—This is an application for revision of an order of the District Judge of Shimoga, refusing to add a party to the suit for whose joinder petitioner has applied.

The application is for revision of an interlocutory order which the court had jurisdiction to pass, an order not illegal or materially irregular, an order against which objection may be taken in the final decree. In such a case, no application under section 622, Civil Procedure Code, lies (I. L. R. 18 Bombay, page 35). The application is rejected.

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## REVISIONAL CIVIL.

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice A. Rangaswami Iyengar.*

K. RAMA RAO, PETITIONER, (RESPONDENT) 1904. December 20.

*vs.*

SIVAPPAIYA, COUNTER-PETITIONER, (APPELLANT).*

*Civil Procedure Code, sections 558, 622—Appeal dismissed for default—Application to restore it—Costs—Revisional Jurisdiction.*

In an application by the appellant for the restoration of his appeal which had been dismissed for default, the lower Appellate Court restored it with costs against the respondent. In revision against this order, the respondent contended that the lower Appellate Court was wrong in awarding costs against him.

*Held*, that the District Judge had jurisdiction under section 558, Civil Procedure Code, to make the order in question and that as the same had not been exercised illegally or with material irregularity, there could be no revision against such an order.

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* Civil Revision Petition No. 87 of 1904-05, against the order of the District Judge of Shimoga in Mis. Appeal No. 25 of 1903-04/Mis. Case No. 61 of 1904-05.

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1904.

RAMA RAO v. SIVAPPAIYA.

*Parasurama Ayyar* v. *Seshier, I.L.R.*, 27 *Mad.*, 504, *referred to.*

APPLICATION for re-admission of an appeal under section 558, Civil Procedure Code. The District Judge of Shimoga granted the application with costs.

The respondent preferred this Civil Revision Petition.

Mr. *C. Krishna Murti* for the petitioner.

Mr. *B. Ramanna* for the counter-petitioner.

ORDER—In an application under section 558, Civil Procedure Code, to restore an appeal dismissed for default, the appellant's pleader applied that he had not appeared owing to a mistaken entry in his diary. The appeal was restored with costs against the respondent. The respondent has petitioned and urged that the order as to costs is irregular, because the default being due to a mistake of the appellant's pleader, the respondent should not have been made liable.

The respondent resisted the application for restoration and it appears that costs were given against him for that reason. It would, no doubt, have been more just to order that each party should pay his own costs since both parties were in the wrong. But the judge exercised the jurisdiction which he has under section 558 to make an order as to costs and it is impossible to hold that he exercised it illegally or with material irregularity so as to permit revision under section 622, Civil Procedure Code. There is a consensus of decisions ending with that at page 504 of I. L. R., 27 Madras, that, in such case, there can be no revision. We therefore dismiss the present application but without costs against the applicant.

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## MISCELLANEOUS CIVIL

*Before Mr. Justice A. E. Staley, Chief Judge, and Mr. Justice H. V. Nanjundayya.*

CHICK DEVARAJ URS, PETITIONER, (RESPONDENT)

*v.*

SRI LAKSHMI NARAYANASWAMY COMPANY, LTD., BY AGENT PUTTU SUBRAYA SETTY, COUNTER-PETITIONER, (APPELLANT).*

1904: October 24.

*Civil Procedure Code, section 623—Review of Judgment—Re-hearing of the whole case discretionary after review is granted—Estoppel—*Res-judicata.

*Held*, that the decision of this Court in Miscellaneous Appeal No. 32 of 1901-02 did not amount to a finding that the terms of the decree were in themselves proper, for, such a finding could only be made in an appeal against those terms and therefore that decision did not estop the Company from contending in an appeal against the decree that the terms of the decree were erroneous.

*Held further*, that it was within the discretion of the Court to re-hear the whole case when a review of judgment was granted on a particular ground.

*Hurbans Sahye* v. *Thakoor Purshad, I. L. R., 9 Cal.,* 209, *followed.*

REVIEW PETITION. The respondent in Regular Appeal No. 176 of 1901-02 presented this petition for review of judgment passed in the case. The facts are fully set out in the order passed by the Chief Court.

Messrs. *M. C. Ranga Iyengar* and *M. B. Varadaraja Iyengar* for the petitioner.

Mr. *L. Sreenivasa Iyengar* for the counter-petitioner.

ORDER.—The circumstances of this case so far as it is necessary to notice them for this decision are as follows:—The plaintiff now petitioner sued upon a deed of assignment in his favour executed by defendant No. 2 of a bond (Exhibit A) executed by the defendant No. 1 Company in favour of defendant No. 2 pledging two mortgage bonds, executed by two several parties for several amounts, for a loan of 6,000 Rs. The plaintiff in that suit (O. S. No. 24 of 1900-1901 in the Court of the Subordinate Judge of Mysore) got

* Civil Petition No. 185 of 1903-04, praying for a review of judgment passed by the Chief Court in Regular Appeal No. 176 of 1901-02.

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CHICK DEVARAJ URS v. SRI LAKSHMI NARAYANASWAMY COMPANY, LTD.

a decree to recover the amount in suit with interest and costs against the assets of defendant No. 1 Company and the hypothecated property scheduled in the plaint. The plaintiff presently took out execution by attachment of the two deeds of hypothecation and the rights of the defendant company in the said deeds, brought them to sale and himself purchased. The company appealed. And in Mis. Appeal No. 32 of 1901-02 this Court held that the plaintiff having got a decree could not go behind its terms in execution and the Court ordered the sale of the bonds to be set aside. The defendant company also appealed against the original decree and in Appeal No. 176 of 1901-02 this Court in modification of the decree of the Original Court decreed that plaintiff was entitled to realize the judgment-debt by sale of the bonds which had been pledged to defendant No. 2 under Exhibit A. It was then held that defendant No. 2 not being transferee of the original mortgage debts did not assign them to the plaintiff and plaintiff could not, consequently, bring the property originally mortgaged to sale. In the application for review the grounds of the application were that the matter of the sale of the property itself was *res judicata* by reason of the decision of this Court in Mis. Appeal 32 already referred to; and that the defendant company is estopped from re-opening that matter. The application for review was allowed on the ground that the effect of the proceedings in Mis. Appeal No. 32 on the questions involved in Appeal No. 176 was not considered in the judgment in the latter Appeal.

After examining those proceedings, however, we think that they give rise to no question of *res judicata* or estoppel. In Mis. Appeal No. 32 this Court properly held that the original decree should not be executed in a way not provided by its terms. But there was no finding, and there could in that case be no finding that the terms of the decree were in themselves proper. Such finding could only be made in an appeal against those terms. The defendant company, on the other hand, were within their rights in contending that the original decree could not be executed except according to its terms. But that in no way estopped the company from contending that those terms were erroneous. It is true that, in their grounds of appeal in Mis. Appeal 32 the company did urge that "if the properties themselves had been sold as directed by the

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CHICK DEVARAJ URS v. SRI LAKSHMI NARAYANASWAMY COMPANY, LTD.

decree, the sale would have fetched more than the amount due under the hypothecation bonds." But the company did not cause the properties themselves to be sold or do any act pointed out to us which in equity we could hold prevented them from pleading in appeal against the original decree that the properties should not be sold, and that the original decree was so far not valid.

It has been urged that the Appeal No. 176 having been restored, the whole case has been re-opened and the plaintiff is entitled to be heard on it. We think it is in the discretion of the Court when review of judgment is granted on a particular ground to rehear the whole case (I. L. R., 9 Cal. p. 209), and we accordingly have heard the arguments. It has been then contended for the plaintiff that he, as assignee of the original mortgagee's interest in part, is in the position of a sub-mortgagee and can bring the original properties to sale. The authority referred to is the case *Muthu Vijia R R V M Thurai* v. *Venkatachallam Chetti* and others, reported in I. L. R., XX Mad. p. 35, dissenting from other rulings of the Bombay and Allahabad High Courts referred to therein. But we do not think that a decision on this point is called for in the present case because the plaintiff has not produced and sought to enforce the original mortgage bonds in this suit. It appears from the deed of assignment (Exhibit B) executed by the defendant No. 2 in the plaintiff's favour that the original mortgage bonds of 11th May 1896 executed by defendants 5, 6 and 7, and of 26th May 1896 executed by defendants 3 and 4 in this suit were assigned and made over to the plaintiff. But it has not been explained why they have not been produced and sued on by him in this suit. The defence of the 7th defendant in this suit was that there was a prior mortgagee Chicka Putta Gowda who, though a necessary party, has not been made a party to this suit. In the absence of those deeds and of explanation of their absence, and in ignorance of their terms and without our being satisfied that all the parties interested in them are before the Court, it is obvious that the plaintiff cannot get a decree for sale of the properties mortgaged under them.

It is accordingly ordered that the order of 26th February 1904 of this Court in Appeal No. 176 will remain, except that the plaintiff-respondent will pay subsequent costs on review in this Court.

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# MISCELLANEOUS CIVIL.

*Before Mr. Justice A. Rangaswami Iyengar and Mr. Justice H. V. Nanjundayya.*

1904. October 31.

SESHAMMA, PLAINTIFF

*v.*

SUNDARAMMA, DEFENDANT.*

*Civil Procedure Code, section* 617—*Reference to the Chief Court when decree is not final—Not allowed.*

The daughter of a deceased hypthecatee sued for recovery of money from the hypothecated properties without producing a certificate of heirship and the Munsiff feeling doubtful whether a decree could be granted in the case, referred it to the Chief Court under section 617, Civil Procedure Code.

*Held,* that as the case was not one in which the decree was final within the meaning of section 617, Civil Procedure Code, it was not open to the Munsiff to make a reference in the case.

OPINION.—The case is not one in which the decree is final within the meaning of section 617 of the Code of Civil Procedure and so it was not open to the Munsiff to make a reference to this Court. *See* the *Secretary of State* v. *Fazal Ali,* I. L. R. 18 Calc, 234 at p. 239.

We therefore decline to pronounce an opinion on the question raised. The record will be returned to the lower court to be disposed of in due course.

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* Civil Referred Case No. 2 of 1904-05 from the Principal Munsiff of Bangalore in Original Suit No. 18 of 1904-05.

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# APPELLATE CRIMINAL.

*Before Mr. Justice A. Rangaswami Iyengar and Mr. Justice H. V. Nanjundayya.*

1904. December 29.

SUBBIAH CHETTY AND ANOTHER, APPELLANTS, (ACCUSED Nos. 1 & 2).

*v.*

GOVERNMENT OF MYSORE, RESPONDENT.*

*Criminal Procedure Code, sections, 180, 188—Jurisdiction—Offence committed outside Mysore limits—Conviction of accused by a Magistrate in Mysore—Legality—Surrender of accused by British Government—Waiver of their right to try the accused not proved.*

The 1st appellant was convicted by the City Magistrate of Bangalore of the offence of being in possession of stolen property at Madras under section 411, Indian Penal Code. On appeal,

*Held*, that though the accused person was brought under the Extradition Act from Madras for the offences of house-breaking and theft, yet as it had not been ascertained as required under section 188, Criminal Procedure Code, whether the British Government had waived their right to try him for the offence of receiving stolen property in their own Courts, the conviction of the accused must be set aside.

*Held also*, that the provisions of section 180, Criminal Procedure Code, which authorized the trial of the offence of receiving stolen property by the Court within whose limits the property was stolen, could not supersede the proviso to section 188.

Per Justice NANJUNDAYYA, that the facts which gave jurisdiction in a case like the present should be specially stated and proved by the prosecution.

CHARGE under sections 454, 380, 411, Indian Penal Code. Three persons were charged with offences under those sections before the City Magistrate of Bangalore. The accused No. 1 was convicted under section 411 and sentenced to rigorous imprisonment for 6 months and a fine of Rs. 50. The accused No. 2 was convicted under section 454, Indian Penal Code and sentenced to 18 months'

* Criminal Appeal No. 65 of 1904-05 against the conviction and sentence by the City Magistrate of Bangalore in Criminal Case No. 16 of 1904-05.



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1904. rigorous imprisonment and a fine of Rs. 50. The accused No. 3 was acquitted.

SUBBIAH CHETTY v. GOVERNMENT OF MYSORE.

The accused Nos. 1 and 2 preferred this Criminal Appeal.

JUDGMENT.—Mr. Justice A. RANGASWAMI IYENGAR :—As regards the 2nd appellant Dodrangiah, there is reliable evidence to show that he was seen near the house of the complainant on the day of the house-breaking and that he was in possession soon after, of some of the articles which had been stolen and that he had presented some and pledged another at Madras. His guilt is thus clearly made out and the conviction and sentence passed against him are proper and are affirmed.

As regards the 1st Subbiah, the learned City Magistrate has properly acquitted him of the offence of house-breaking and theft. He has however convicted him under section 411, I. P. C. From the evidence of the 5th and 2nd witnesses for prosecution, it is clearly proved that he pledged a female cloth stolen in the theft in the complainant's house with the former witness and that he gave out to him that the cloth was his own. The accused tried in defence to prove that he pledged the cloth on account of the 2nd witness but failed. From these circumstances, it may be fairly inferred that he dishonestly received or helped in disposing of stolen property, knowing or having reason to believe that it was stolen.

But it is to be noted that this offence was committed by the accused at Madras. It is not stated in the records of the case whether he is a native of Mysore or not. But from the statements of the prosecution 11th witness that he lived in Mysore formerly and of the 3rd witness for defence that he was living in Arlepet, Bangalore, before he left for Madras about 5 years ago, he may be presumed to be a native of Mysore. Under section 188 of the Criminal Procedure Code, when a subject of His Highness the Maharaja commits an offence at any place outside the Mysore State, he can be tried for that offence in Mysore only after ascertaining whether the British Government waives its right to surrender of the accused. The accused was brought under the Extradition Act from Madras for the offence of house-breaking and theft. From this it cannot be inferred that the British Government waived its right to try him for the offence of receiving stolen property in their own Courts.

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SUBBIAH CHETTY *v.* GOVERNMENT OF MYSORE.

Section 180, Criminal Procedure Code, which provides that the offence of receiving stolen property may be tried either by the Court within whose limits the goods were stolen or by any Court within whose jurisdiction the property was dishonestly received, cannot supersede the proviso to section 188. Moreover, no authority has been pointed out to show that when any person has been extradited for an offence of theft, he could be tried and convicted for the offence of receiving stolen property wherever committed.

Under these circumstances there is no alternative but to set aside the conviction of the 1st accused and order his acquittal, without prejudice to his retrial after complying with the formality prescribed by section 188, Criminal Procedure Code. Ordered accordingly.

Mr. Justice H. V. NANJUNDAYYA :—I concur.

I wish only to add that, in my opinion, the facts which give jurisdiction in a case like the present should be specially stated and proved by the prosecution. The offence was committed in Madras, and *prima face*, the court had no jurisdiction to try the 1st accused here. There is nothing in the record to show that either the court or the 1st accused was aware of the fact that an exceptional jurisdiction was being assumed on the ground that the latter is a subject of this State.

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# REVISIONAL CRIMINAL.

*Before Mr. Justice A. Rangaswami Iyengar and Mr. Justice H. V. Nanjundayya.*

1904. November 14.

IN THE MATTER OF BHEEMA, ACCUSED.*

*Criminal Procedure Code, sections 188, 530 clause (p)—Theft committed in British Territory—Jurisdiction of Magistrates in Mysore to try the accused.*

Where a person committed theft of a bullock in the Dharwar District and brought the same into the limits of Mysore, he was charged with the offence of theft before an Amildar Magistrate and convicted and sentenced to one month's rigorous imprisonment. On a reference by the District Magistrate,

*Held,* that as the accused could not be tried for theft without first ascertaining whether the British Government had waived their right to demand the surrender of the accused, the conviction of the accused in the present case must be quashed as having been passed without jurisdiction under section 530 clause (p) of the Code of the Criminal Procedure.

This was a Reference under section 438, Criminal Procedure Code, made by the District Magistrate of Shimoga in the following terms:—

"Bheema the accused in this case and his master one Hanuma committed theft at Nittuvalli in the Ranibennur Taluk, Dharwar District, of a bullock belonging to one Veerabadrappa prosecution 2nd witness and brought the stolen bullock to Kittadahalli in the Shikarpur Taluk and offered the same for sale to Ninganna 7th prosecution witness. On the latter demanding the seller to produce the Patel's chit, Hanuma went away leaving behind the accused Bheema and the bullock promising to bring the chit from the Patel of his village. The accused Bheema also managed to escape to his village in the Harihar Sub-Taluk leaving behind the stolen bullock. Veerabadrappa learning that his bullock was in the Shikarpur Taluk, complained to the Police of that Taluk who arrested the accused Bheema in his native village of Hallihal in the Harihar Sub-Taluk and placed him (the other accused Hanuma not having been found) before the Acting Amildar and 3rd Class Magistrate of Shikarpur Taluk. The accused Bheema having confessed his guilt the Taluk Magistrate convicted him under section 379 of the Indian Penal Code and sentenced him to undergo one month's rigorous imprisonment.

* Criminal Revision Case No. 45 of 1904-05. (Reference No. 60 dated 23rd September 1904 from the District Magistrate of Shimoga in Criminal Case No. 40 of 1904-05 on the file of the Amildar and 3rd Class Magistrate of Shikarpur).

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IN THE MATTER OF BHEEMA.

2. The offence of theft was committed outside Mysore Territory and though under section 188 of the Criminal Procedure Code as in force in Mysore the accused who is a subject of Mysore could be tried here for the offence committed by him in the Dharwar District, yet it is doubtful whether section 188, Criminal Procedure Code, gives a Mysore Magistrate jurisdiction over the accused before the formalities prescribed in the proviso to the section have been observed. The offence committed by the accused is an extraditable offence and the record does not show if the British Government were asked whether they would waive their right of demanding the surrender of the accused.

3. The records of the case will be submitted to the Chief Court for orders under section 439 of the Criminal Procedure Code."

ORDER.—The accused in this case has admitted not only his having stolen the bullock outside Mysore Territory but also his possession of the stolen bullock and attempt to sell the same within the Province. Though he could not be tried for theft of the bullock out of Mysore without the formality provided in section 188, Criminal Procedure Code, there is nothing against his being tried and convicted for dishonestly retaining stolen property or assisting in disposing of it under section 411 or 414, I. P. C., since under section 30 of Regulation I of 1904 stolen property has been defined to include property stolen "within or without Mysore". But as the Taluq Magistrate of Shikarpur, who tried the accused for theft, is only a 3rd class Magistrate and is not empowered to try an offence under section 411 or 414, the conviction under section 379 cannot be altered to one under section 414, I. P. C., and as the accused cannot be tried for theft without first ascertaining whether the British Government waived its right to demand the surrender of the accused, the conviction must be quashed as passed in a trial without jurisdiction (section 530, cl: p, Criminal Procedure Code). The accused has undergone the sentence passed in this case and there is no need for ordering his retrial. The records will be returned with the above remarks.

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# REVISIONAL CRIMINAL.

*Before Mr. Justice A. Rangaswami Iyengar.*

1904.
December 7.

IN THE MATTER OF KARI MUNIGA AND ANOTHER, ACCUSED.*

*Court Fees Regulation III of* 1900, *section* 39—*Acquittal of accused—Order for repayment of costs to complainant—Illegal—Criminal Procedure Code, section* 439.

A Magistrate in a criminal case acquitted the accused persons and ordered them to pay costs to the complainant. On a reference,

*Held*, that the order of the Magistrate awarding costs to the complainant when the accused persons were acquitted, was contrary to section 39 of the Court Fees Regulation and therefore must be set aside under section 439, Criminal Procedure Code.

This was a Reference from the District Magistrate of Kolar in the following terms:—

"Under section 438 of the Criminal Procedure Code, I have the honor to forward herewith the record in Criminal Case No. 18 of 1904-05 on the file of the Amildar and 2nd Class Magistrate of Kolar Taluk, for the orders of Chief Court.

2. The complainant in this case, one Muni, filed a complaint for assault on 30th May 1904 before the then Amildar and 2nd Class Magistrate of Kolar Taluk, who dismissed the same under section 203, Criminal Procedure Code. On the complainant moving this Court on the Revision side, the Amildar-Magistrate was directed to restore the case to his file and dispose of it according to law. He enquired into the case and in acquitting the accused persons, ordered that they should pay the complainant's Court costs amounting to Rs. 3-4-0 and that in default of payment they should suffer 5 days' simple imprisonment. This order is now sought to be set aside.

3. The order of the Magistrate is opposed to the provisions of section 39 of the Mysore Court Fees Regulation III of 1900 which lays down that Court costs in non-cognizable cases shall be awarded if the accused is convicted.

4. The award of costs in this case was illegal as the accused were acquitted and I beg to recommend that the order of the Taluk Magistrate may be set aside and the amount, if already paid, ordered to be refunded to the accused."

* Criminal Revision Case No. 71 of 1904-05. (Reference No. 3064/2481 dated 5th December 1904, from the District Magistrate of Kolar in Criminal Case No. 18 of 1904-05 on the file of the Amildar and 2nd Class Magistrate of Kolar).

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ORDER.—The order of the Taluq Magistrate awarding costs to the complainant, when the accused were acquitted, is contrary to section 37 of the Court Fees Act, and is quashed under section 439, Criminal Procedure Code.

1904.

IN THE MATTER OF KARI MUNIGA.

---

## REVISIONAL CRIMINAL.

*Before Mr. Justice A. Rangaswami Iyengar.*

IN THE MATTER OF SANNA AND ANOTHER, ACCUSED.*

1904. December 16.

*Whipping Regulation V of* 1903, *section* 7 *clause (b)—Sentence of fine passed by third Class Magistrate—Non-payment of fine—Magistrate ordering production of accused before District Magistrate for action under the Wipping Regulation—Legality.*

Where two perons were charged with the offence of theft, the Amildar-Magistrate who tried the case convicted both the accused persons and sentenced them to fines of Rs. 6 and 4 respectively. With regard to the 2nd accused who was about 12 years old, the Magistrate ordered that in default of payment of fine he may be sent to the District Magistrate for being dealt with under the Whipping Regulation. On a reference by the District Magistrate,

*Held,* that the order of the Amildar-Magistrate regarding the production of the 2nd accused before the District Magistrate was not in accordance with law and must be set aside.

This was a Reference from the District Magistrate of Hassan in the following terms:—

"The Police of the Arsikere Taluk arraigned the accused Sanna and Basava before the Amildar and 3rd Class Magistrate of that Taluk on a charge that they, on the 29th November last, committed theft in respect of some sugar-cane nurslings that had been grown by the prosecution 1st witness Marijogi and transplanted them in their (accused's) own land and that thereby committed an offence falling under section 379 of the Indian Penal Code.

---

* Criminal Revision Case No. 78 of 1904-05. (Reference No. 410 dated 10th December 1904 from the District Magistrate of Hassan in Criminal Case No. 63 of 1904-05 on the file of the Amildar and 3rd Class Magistrate of Arsikere.)

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1904.

IN THE MATTER OF SANNA.

2. The Taluk Magistrate examined 2 witnesses for the prosecution including the said Marijogi and on admission of the accused of the commission of the offence complained of, convicted the 1st and 2nd accused of the offence of theft under section 379 of the Indian Peneal Code and sentenced the 1st accused Sanna to pay a fine of Rs. 6 and the 2nd accused Basava to Rs. 4. In default of payment of fine the 1st accused was ordered to undergo rigorous imprisonment for 12 days and the 2nd accused was directed to be sent to the District Magistrate for being dealt with under the Whipping Regulation as he appeared to be a juvenile offender.

3. The sentence passed on the 2nd accused is illegal inasmuch as the Magistrate having passed a substantive sentence of fine (*viz.* Rs. 4) upon him has ordered his being produced before the District Magistrate for being dealt with under the Whipping Regulation as an alternative portion of the sentence for non-payment of the fine inflicted.

4. Clause (*b*) of section 7 of the Mysore Whipping Regulation V of 1903 provides a sentence of whipping for a juvenile offender in lieu of any other substantive punishment provided for the offence. In this case the 2nd accused is stated to be 12 years of age and in pursuance of the above provision, the Taluk Magistrate who is not empowered to pass a sentence under Whipping Regulation should have under section 349 of the Criminal Procedure Code forwarded the 2nd accused to this Court with his finding and the records of the case without passing any sentence upon him at all. As the 2nd accused was not subsequently produced before this Court, it is presumed that his fine was duly paid in full. As the portion of 2nd accused's sentence above alluded to has to be set aside, the records of the case will be submitted to the Chief Court for orders."

ORDER.—So much of the order of the Taluk Magistrate as directs that, in default of the payment of fine, the 2nd accused shall be placed before the District Magistrate to be dealt with under the Whipping Act is cancelled, as not being in accordance with law.

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# REVISIONAL CRIMINAL.

*Before Mr. Justice A. E. Staley, Chief Judge.*

LINGA, PETITIONER, (COMPLAINANT).*

1904. November 10.

*Criminal Procedure Code, sections* 417, 439—*Acquittal—Order of acquittal—Chief Court's power of revising such order—Revision.*

Although the Chief Court can interfere with an order of acquittal by way of revision to direct a new trial, there must be some reason assigned and made out for such order other than that the Magistrate did not believe the evidence of the witnesses before him.

*Queen-Empress* v. *Balwant, I. L. R.*, 9, *All.*, 134, *referred to.*

Two persons were charged with the offence of mischief under section 427, Indian Penal Code, before the Amildar Magistrate of Malavalli and acquitted.

Against that order of acquittal, the complainant preferred this Criminal Revision Petition.

Messrs. *B. Nanjundappa* and *S. Ranganna* for the petitioner.

ORDER.—This is an application under section 439, Criminal Procedure Code, to revise an order of the 2nd Class Magistrate of Malavally Taluq, acquitting two persons of an offence under section 427, Indian Penal Code. The case against the accused was that they filled up a waste weir water channel, the property of Government, and thereby caused the petitioner's betel leaf plantation to be flooded and damaged. The application is urged only on the ground that the accused should, on the evidence, have been convicted. In a case such as the present, an appeal under section 417, Criminal Procedure Code, could, had the Government considered proper, have been filed. Although this court can interfere by way of revision to direct a new trial, (I. L. R. 9 Allahabad, p. 134), there must be some reason assigned and made out for such order other than that the Magistrate did not believe the evidence of the witnesses before him. The Magistrate has written a judgment fully dealing

* Criminal Revision Petition No. 89 of 1904-05, praying that the proceedings of the Amildar and 2nd Class Magistrate of Malavalli in Criminal Case No. 82 of 1903-04, may be called for and revised.



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1904.

LINGA.

with the evidence and there is no reason to believe that, if a re-trial were ordered, he or any other Magistrate would come to any conclusion other than the decision of which review is sought.

The application is rejected.

---

## REVISIONAL CRIMINAL.

*Before Mr. Justice A. E. Staley, Chief Judge.*

1904. December 21.

KUNDARAME GOWDA, PETITIONER, (ACCUSED No. 7)

*v.*

GOVERNMENT OF MYSORE, COUNTER-PETITIONER, (COMPLAINANT).*

*Indian Penal Code, section 160—Right of private defence—Plea set up in revision—Court of Revision.*

The petitioner along with several others was convicted by the Amildar Magistrate of Mysore of the offence of committing an affray under section 160, Indian Penal Code. The conviction was confirmed in appeal by the District Magistrate of Mysore. In a revision petition presented by accused No. 7, it was contended on his behalf that he was acting merely in self-defence.

*Held*, that as the accused had neither pleaded nor proved before the Amildar-Magistrate that he was acting in self-defence, such a plea could not be admitted in revision.

*Queen-Empress* v. *Timmal*, *I. L. R.*, 21, *All.*, 122. *followed.*

Mr. *C. V. Narasimha Iyengar* for the petitioner.

The Government Advocate (Mr. *S. Ramaswami Iyer*) for the counter-petitioner.

ORDER.—This is an application on various grounds for remission of the petitioner's conviction with a sentence of 10 Rs. fine for affray under section 160, I. P. C. The order of conviction was passed so long ago as the 7th June last and the conviction was affirmed by the District Magistrate of Mysore on the 16th August last. The petition for revision was not filed till the 18th November.

---

* Criminal Revision Petition No. 49 of 1904-05, against the Judgment of the District Magistrate of Mysore in Criminal Appeal No. 1 of 1904-05.

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1904.

KUNDARAMB GOWDA v. GOVERNMENT OF MYSORE.

The first ground taken is that both Courts found the complainant party were the aggressors and commenced the fight on the petitioner and another, merely questioning the propriety of their acts; it must be inferred that, when the petitioner acted thereafter, he acted merely in self-defence.

If it were plain that the petitioner acted in self-defence, his conviction should not be supported though he had not pleaded that he acted in self-defence (1 C. W. Notes p. 545; 11 C. L. R. 232). But in the present case, the petitioner, it is apparent, not only did not plead that he acted in self-defence but adduced false evidence to prove an *alibi* and no witness for the prosecution or defence gave any evidence to prove that the petitioner acted in self-defence. The plea therefore cannot now be admitted. (I.L.R., 21 Allahabad., p. 122; 1 Calcutta L. Reports., p. 62).

It is next urged that the evidence discloses an offence under section 148, I. P. C., which the convicting Magistrate had no jurisdiction to try. On examining the record, I cannot agree in this contention. The evidence sufficiently shows that there was a common affray.

It is also urged that the statements of some of petitioner's co-accused though not confessions were taken into consideration in determining that the evidence of *alibi* for the petitioner was false, that the evidence of all the meterial witnesses was partisan and should be treated as evidence of accomplices, and that there may have been a mistake as to the petitioner between him and a witness of the same name.

Though the material witnesses were partisan, their evidence cannot be treated as that of accomplices, and it was sufficient to justify conviction, apart from the statements of the petitioner's co-accused. If there was a mistake being made between petitioner and another of the same name, this should have been brought out in cross-examination.

The petition is dismissed.

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# THE

# MYSORE CHIEF COURT REPORTS.

CASES DETERMINED

BY THE

## CHIEF COURT OF MYSORE.

REPORTED BY

D. VENKATARAMAYYA, B. A.,

(*Advocate*),

*Law Reporter in Mysore.*

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## 1904.

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### Chief Judge:

Mr. Justice A. RAMACHANDRA IYER, (*up to 30th June* 1904).

Mr. Justice A. E. STALEY, (*from 1st July* 1904).

### Puisne Judges:

Mr. Justice A. RANGASWAMI IYENGAR.

Mr. Justice H. V. NANJUNDAYYA.

---

### Government Advocate:

Mr. S. RAMASWAMI IYER.

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such as those brought to the notice of the court in the course of the enquiry. On Revision:—*Held,* that the duty to keep the roads free from pits or holes and the culverts safe so as to prevent accidents to the public devolved upon the Municipal Commissioners as the custodians of the roads and their liability was similar to that of an occupier of land with regard to persons coming on his land. *Held also,* that the proviso "So far as the funds at their disposal will admit" contained in section 101 of the Bangalore Town Municipal Regulation, 1871, could not exempt the Municipality from all liability to maintain or repair the roads at least when they are dangerous to traffic.

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Regulation was intended to mean only the property or portion of property actually sued for and not the whole property regarding which enquiry would necessarily have to be made in connection with the suit. *Held also*, (Justice NANJUNDAYYA, dissenting), that as the plaintiffs in the present case wanted a declaration that the items of property in their possession as well as those sued for were the self-acquired property of their father, that they should be confirmed in possession of the former without being called upon to surrender any of them to the defendant and that they should be awarded the property in the possession of the defendant, the whole property minus Rs. 5,000 relinquished by the plaintiffs was the amount or value of the subject matter in suit and therefore the Sub-Judge had no jurisdiction to entertain the suit.

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*Lakshminaranappa* v. *Srirungia*, (4 Mys. Ch. Ct R.. 58), followed. 189

*Lakmishankar Devshankar* v. *Vishnuram*, (I. L. R., 24 Bom., 77), referred to. 122

*Lalman Das* v. *Jagan Nath Singh*, (I. L. R., 22 All., 376), followed. 132

*Mahabir Pershad Singh* v. *Dhanukdhari Singh*, (I. L. R., 31 Cal., 815), followed .. .. .. .. .. .. 132

*Manohar Das* v. *Ram Autar Pande*, (I. L. R., 25 All., 431), referred to .. .. .. .. .. .. .. 200

*Mashiat-un-nissa* v. *Rani*, (I. L. R., 13 All., 12), dissented from .. 54

*Merwanji Mancherji Cama* v. *Syed Sirdar Ali Khan*, (I. L. R., 28 Bom., 510), distinguished .. .. .. .. 170

*Moro Raghunath* v. *Balaji Trimbak*, (I. L. R., 13 Bom., 45), distinguished .. .. .. .. .. .. 52

*Motilal Kashibhai* v. *Nana* alias *Langda Mukund Patil*, (I. L. R., 18 Bom., 35), followed .. .. .. .. ..317,318

*Narasinga Row* v. *Muthaya Pillai*, (I. L. R., 26 Mad., 362, refered to ... .. .. .. .. .. .. 252

*Narindra Bahadur Pal* v. *Khadim Husain*, (I. L. R., 17 All., 581), distinguished ... ... ... ... ... ... 298

*Nirvanaya* v. *Nirvanaya*, (I. L. R., 9 Bom., 365), followed ... 165

*Nurul Hossein* v. *Sheosahai Lal*, (I. L. R., 20 Cal., 1), approved ... 113

*Parashram Valad Bapu* v. *Miraji Valad Subhana*, (I. L. R., 20 Bom., 569), approved ... ... ... ... ... 118

*Parasurama Ayyar* v. *Seshier*, (I. L. R., 27 Mad., 504), referred to. 320

*Premji Ludha* v. *Dossa Doongersey*, (I. L. R., 10 Bom., 358), referred to ... ... ... ... ... ... ... 246

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*Queen-Empress* v. *Ahmed*, (I. L. R., 9 Mad., 448), referred to ... 231

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*Queen-Empress* v. *Nand Ram*, (I. L. R., 9 All., 609), referred to .. 95

*Queen-Empress* v. *Timmal*, (I. L. R., 21 All., 122), followed ... 334

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*Raghumoni Audhikary* v. *Nilmoni Singh Deo*, (I. L. R., 2 Cal., 393), followed ... ... ... ... ... ... 145

*Rajagopal Takkaya Naiker* v. *Muttupalem Chetti*, (I. L. R., 3 Mad., 103), commented on ... ... ... ... ... 165

*Ramasami* v. *The Queen-Empress*, (I. L. R., 7 Mad., 292), followed. 81

*Ram Dhun Dhur* v. *Mohesh Chunder Chowdhry*, (I. L. R., 9 Cal., 406), distinguished... ... ... ... ... ... 52

*Ramunni* v. *Shanku*, (I. L. R., 10 Mad., 367), referred to ... 294

*Rangammal* v. *Echammal*, I. L. R., 22 Mad., 305), approved ... 134

*Reference under Stamp Act, section* 46, (I. L. R., 8 Mad., 15), followed ... ... ... ... ... ... ... 96

*Reg.* v. *Adivigadu*, (I. L. R., 1 Mad., 171), followed ... ... 79

*Rikhi Ram* v. *Sheo Parshan Ram*, (I. L. R., 18 All., 316), distinguished ... ... ... ... ... ... ... 298

*Sesha Ayyar* v *Krishna Ayyangar*, (I. L, R., 24 Mad., 96), followed. 198

*Shiva Devi* v. *Jaru Heggade*, (I. L. R., 15 Mad., 290), followed ... 294

*Shroff Runga Row* v. *Edigara Narasimha Gowda*, (2 Mys. Ch. Ct. R., 151), referred to ... ... ... ... ... 312

*Siddessury Dassee* v. *Janardan Sarkar*, (I. L. R., 29 Cal., 557), followed ... ... ... ... ... ... ... 134

*Sinaya Pillai* v. *Munisami Ayyan*, (I. L. R., 22 Mad., 289), referred to... ... ... ... ... ... ... ... 165

*Siyadat-un-nissa* v. *Muhammad Mahmud*, (I. L. R., 19 All., 342), followed ... ... ... ... ... ... ... 266

*Sorabji Edulji Warden* v. *Govind Ramji*, (I. L. R., 16 Bom., 91), referred to ... ... ... ... ... ... 200

*Sri Maniyam Mahalakshmamma Garu* v. *Sri Maniyam Venkataratnamma Garu*, (I. L. R., 6 Mad., 83), followed ... ... 134

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*Subbaraya Mudali* v. *The Sub-Collector of Chingleput*, (I. L. R., 6 Mad., 307), referred to ... ... ... ... ... 123

*Subjoo Das* v. *Balmukund Das*, (I. L. R., 23 Cal., 212), referred to. 49

*Tarini Charan Chowdhry* v. *Amulya Ratan Roy*, (I. L. R., 20 Cal., 867), referred to ... .. ... ... ... ... 105

*Thakur Prasad* v. *Partab*, (I. L. R. 6 All., 442), followed .. ... 145

*The Empress* v. *Sunker Gope*, (I. L. R., 6 Cal., 307), distinguished. 79

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*Venkatasubbaraya Chetti* v. *Zamindar of Karvetinagar*, (I. L. R., 20 Mad., 159), followed .. ... ... ... ... 132

*Virupakshappa* v. *Shidappa* and *Basappa*, (I. L. R., 26 Bom., 109), commented on ... ... ... ... ... ... 165

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*Yesu Ramji Kalnath* v. *Balkrishna Lakshman*, (I. L. R., 15 Bom., 583), referred to ... ... ... ... ... ... 306

CAUSE OF ACTION—*See* DECREE (1).

2. ——————*See* CIVIL PROCEDURE CODE, section 16.

3. ——————*See* INDIAN LIMITATION ACT, SCHEDULE II, ARTICLE 63.

CIVIL PROCEDURE CODE, sections 2, 220, 373, and 588—*Costs—Appeal—Withdrawal of suit—Appeal from order permitting unconditional withdrawal—Decree.*] In a suit for damages for defamation, the plaintiff applied for its withdrawal without permission to file a fresh suit and the Sub-Judge granted the prayer and ordered the plaintiff to pay only a portion of the costs which the defendant had incurred. In appeal by the latter against the order relating to costs, it was contended that no appeal lay in such a case :—*Held*, that an order for the withdrawal of a suit without permission to file a fresh suit like an order rejecting a plaint came within the definition of a decree and was therefore appealable. *Held further*, that the order as to costs was not sustainable as the expression "considering all the circumstances of the case" used by the Sub-Judge

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was not acceptable as a reason within the meaning of section 220 of the Civil Procedure Code.

*M. Narasimiah* v. *D. Narasinga Rao* ... ... ... 38

2. ————————, section 16—*Jurisdiction—Decree affecting property outside territorial jurisdiction of Court—Effect as between parties to the decree—Estoppel—Right of a person not a party thereto to question its legality—Cancellation of decree, suit for—Cause of action—Discretion of Court—Specific Relief Act, section 39—Fraud alleged but not proved—Effect.*] Some properties were hypothecated by the 2nd defendant to the 1st defendant's predecessor in interest and afterwards three of them were sold to plaintiff by the 2nd defendant and the Deputy Commissioner of Mysore who had attached them for arrears of Excise duty payable by the 2nd defendant to Government. Some time after, the 1st defendant sued the 2nd defandant for recovery of the debt from all the hypothecated properties and a Razinama decree was passed by the Principal Munsiff of Mysore, directing the sale of all the mortgaged properties though all of them were situated outside the Munsiff's territorial jurisdiction. The 1st defendant applied to the Nanjangud Munsiff's Court for executing the decree and the latter ordered the sale of the properties. Thereupon, the plaintiff brought a suit for the cancellation of the decree so far as it affected the aforesaid three properties alleging that the said decree was passed without jurisdiction and that his rights in the properties remained unaffected:—*Held*, that the decree was not null and void as between defendant No. 1 and defendant No. 2 and that as the latter had not appealed against it, he was estopped from saying that he was not bound by it. *Gomatham Alamelu* v. *Komandur Krishnamacharlu*, (I. L. R., 27 Mad, 118), followed. *Vishnu Sakharam Nagarkar* v. *Krishnarao Malhar*, (I. L. R., 11 Bom., 170); *Laksmishankar Devshankar* v. *Vishnuram*, (I.L.R., 24 Bom., 77), referred to. *Held further*, that since the plaintiff did not consent to the decree in the suit to which he was not a party, there was nothing to prevent his questioning the legality of the decree as affecting his interests. *Held also*, that merely by the passing of the decree for sale against defendant No. 2, the plaintiff obtained no cause of action for the present suit and before he could bring such a suit, it was necessary for some circumstances to come into existence, necessitating his application for a declaratory decree, some act hostile to and invading his title, constituting such an otherwise inevitable injury, such an apprehension of serious injury that a Court could properly exercise its discretion to prevent it. *Subbaraya Mudali* v. *The Sub-Collector of Chingleput*, (I. L. R., 6 Mad., 307), referred to. *Held also*, that though the plaintiff had not proved fraud in the decree,

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he had proved his right to a relief consistent with the plaint and evidence and that he might therefore be properly allowed a decree declaring that the decree for sale in Original Suit No. 574 of 1895-96 did not affect his right in the property in suit.

*Rajagopalachar* v. *Sheshachallam Mudaliar* ... ... ... 122

3 ———————, section 23—*Transfer application—Notice to the other side not given—Procedure.*] The defendant in a certain suit applied for a transfer of the case to another court but without giving the plaintiff notice of his intention to do so as required by section 23 of the Code of Civil Procedure:—*Held,* that the original Court had no jurisdiction to entertain the application for transfer until the defendant gave notice in writing to the plaintiff of his intention to apply for transfer and therefore the application must accordingly be dismissed on that ground.

*Shamanna* v. *Shamanna* ... .. ... ... ... 208

4. ———————, sections 32, 622—*Party to a suit—Refusal to add a party— evision against order of refusal—Non-maintainability.*] In a suit for partition, the plaintiffs applied to the Court under section 32 of the Civil Procedure Code to make their father also a party to the suit on the ground that otherwise the suit may be open to the objection of non-joinder of parties. The District Judge rejected the application. On revision:—*Held,* that no application for revision against the order in question lay under section 622 of the Civil Procedure Code. *Motilal Kashibhai* v. *Nana* alias *Langda Mukund Patil,* (I. L. R., 18 Bom., 85), followed.

*Neelappa* v. *Samanna* ... ... ... ... ... 318

5. ———————, section 43—*Suit by a Jodidar for possession of Inam lands in his village—Dismissal of suit—Subsequent suit by Jodidar's son for recovery of kandayam from Inam holder —Survey Settlement introduced into an alienated village—Effect.*] In 1885 the plaintiff's father sued for possession of some lands from defendant, alleging that the defendant held the lands on condition of paying the jodi and rendering some services and that he had failed to do so. In that suit it was decided that the condition alleged in the plaint was not true and that the defendant held the lands rent-free. This decision was confirmed, in appeal, by the Chief Court. In February 1904, the plaintiff brought the present suit for a declaration of his right to receive jodi from the defendant and also for the recovery of arrears of assessment alleging that when the Survey Settlement was introduced into his village in 1896, the defendant failed to prove the lands to be his Inam lands:—*Held,* that the plain-

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tiff's right to recover kandayam or jodi from the lands in dispute was barred by section 43 of the Civil Procedure Code. *Held further*, that merely by the introduction of Survey Settlement, the owner of an alienated village could not evade or alter the obligations he had previously incurred with reference to individual holdings either by agreement or operation of law. *Dodda Venkatiga* v. *B. Venkatiga*, (15 Mys., L. R. 208), referred to.

*N. Rama Row* v. *Puttiah* ... ... ... ... ... 302

6. ——————————, sections 100, 146 and 152—*Procedure when defendant does not appear—Verification of plaint—Decree on verified plaint without further evidence—"May proceed ex-parte," meaning of—Indian Evidence Act, section* 114—*Legality.*] In a suit for recovery of money due on a registered hypothecation bond, the defendants were treated ex-parte and the Munsiff passed a decree on the verified plaint alone without taking any evidence in the case. The question for consideration was whether the procedure adopted by the Munsiff was legal:—*Held*, (Justice RANGASWAMI IYENGAR, *dissenting*), that where the defendant had been duly served with notice of the terms of the plaint and did not appear on the date fixed for hearing and the Court considered no further evidence necessary, the Court could proceed to give judgment upon the plaint without further evidence. *Held also*, that the term "may proceed" in section 100 of the Civil Procedure Code did not necessarily mean that the Court may proceed to record evidence and that it might equally mean that the Court may proceed to record judgment ex-parte.

*Dodda Muniappa* v. *Sesha Char* ... ... ... ... 148

7. ——————————, section 111—*Mortgage—Waste committed by mortgagee in possession—Suit by mortgagee for money—Mortgagor's right to claim a set-off for damage done to mortgaged property—Separate suit not necessary.*] In a suit by a mortgagee for money, the mortgagor's representatives alleged that the plaintiff had wantonly done damage to the mortgaged property and claimed a set-off for the compensation due to them for such damage from him. The Munsiff allowed the set-off and dismissed the plaintiff's suit. In appeal, it was contended on behalf of the plaintiff that the defendants were not entitled to any relief in this suit:—*Held*, that the defendants were entitled to have the damage ascertained in this case alone and have the amount deducted from the mortgage debt and that they need not be driven to a separate suit. *Ramunni* v. *Shanku*, (I. L. R., 10 Mad., 367), referred to. *Shiva Deve* v. *Jaru Heggade*, (I. L. R., 15 Mad., 290), followed.

*Chicka Honnayya* v. *Chennamma* ... ... ... ... 294

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8. ——————————, sections 150, 375—*Razinama petition—Compromise or adjustment—Fresh issue raised therein—Inclusion of matters not the subject of suit—Section of the Code applicable to such petitions—Court's power to entertain them—Decree in those terms, whether proper.*] In a suit for the recovery of produce of some land, the parties filed a razinama and agreed to abide by its terms. The Court received it and appointed a Commissioner to report on a matter referred to in the agreement. On receipt of the Commissioner's report, the Court passed a decree in accordance with it:—*Held,* (1) that the terms of the application fairly came under section 150, Civil Procedure Code; (2) that the Munsiff acted rightly in admitting the agreement and referring the question to the District Surveyor; (3) that the inclusion of other stipulations which did not clash and were not inconsistent with those relating to the matters in dispute, could not vitiate the agreement; and (4) that as the inclusion was not a condition precedent for the parties abiding by the agreement, those reliefs might be safely removed without subjecting the parties to any perceptible disadvantage.

*Siddalingappa* v. *Syed Ajimai Peer Shaw Khadri* alias *Babjee Sab* ... ... ... ... ... ... ... 22

9. ——————————, sections 156, 622—*Interlocutory order passed in an appealable case—Application to revise such order—Revision.*] The defendant in a certain suit applied to the Munsiff to stay proceedings till the disposal of an appeal which was pending in the Chief Court and the Munsiff declined to grant the prayer. On Revision:—*Held,* that the present petition being one to revise an interlocutory order in a suit, in which, if the decree be against the petitioner, he would have a right of appeal, it could not be entertained under section 622 of the Code of the Civil Procedure. *Motilal Kashibhai* v. *Nana* alias *Langda Mukund Patil,* (I. L. R., 18 Bom., 85), followed.

*Venketesappah* v. *Chandrappah* ... ... ... ... 317

10. ——————————, section 209—*Hypothecation—Interest after due date—Property made liable for principal and interest till repayment—Interest from date of decree to date of payment—Liability of hypothecated property therefor—Indian Limitation Act, Schedule II, Article* 116.] In a suit for money due on a hypothecation bond, the lower Court passed a decree awarding plaintiff interest on the balance of principal at the rate stipulated in the document up to date of suit, further interest thereon at 12 per cent per annum from date of suit to date of decree and also further interest thereon from date of decree to date of payment against the hypothecated

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property. The purchaser of the hypothecated property who was defendant No. 7 in the case contended in appeal that the lower Court erred in awarding interest after due date and in making the properties liable therefor and that the lower Court should not have decreed interest at 12 per cent per annum from the date of suit and further interest from the date of the decree against the hypothecated properties:—*Held*, that under the document the stipulation for payment of interest was unlimited and the property was hypothecated generally for the amount which might become due and therefore the interest stipulated must be considered to be due till payment of principal and the property hypothecated for the total amount. *Narindra Bahadur Pal* v. *Khadim Husain*, (I. L. R., 17 All., 581); *Rikhi Ram* v. *Sheo Parshan Ram*, (I. L. R., 18 All., 316); *Gudri Koer* v. *Bhubaneswari Coomar Singh*, (I. L. R., 19 Cal., 19), distinguished. *Held further*, that in the present case as the property was hypothecated for principal and interest thereon till payment, there was nothing in section 209, Civil Procedure Code, to prevent the Court from making interest till payment a charge upon the property in accordance with the agreement between the parties. *Bhawani Prasad* v. *Brij Lal*, (I. L. R., 16 All., 269), not followed.

*A. C. Devaraja Urs* v. *Hanumantia Maistry* ... ... ... 298

11. ——————, sections 223, 224—*Indian Limitation Act, 1877, Schedule II, Art.* 179 (4)—*Step in aid of execution—Certificate of Court transferring decree to another Court for execution.*] On an application presented under section 223, Civil Procedure Code, for the transfer of a decree to another Court for execution, the Court passed an order transferring the decree on 25th October 1900. But the certificate which accompanied the order was dated 3rd January 1901. The present application for execution was presented on 17th December 1903. It was disallowed by the lower Court as being time-barred. In appeal, it was contended that the fact of the certificate being dated 3rd January 1901 constituted a step in aid of execution and that the application was within time:—*Held*, that after the appellant's application under section 223, Civil Procedure Code, was presented, it was the duty of the Court to proceed under section 224 of its own motion and that as there was nothing from which a step in aid of execution could be inferred to have been taken by the appellant, further execution was barred by the provisions of Art. 179 (4) of Schedule II, Limitation Act, 1877. *Koormayya* v. *Krishnamma Naidu*, (I. L. R., 17 Mad., 165), distinguished.

*Rangashesha Shastry* v. *Ramaswamaiya* ... ... ... 193

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12. ————————, section 244—*Suit to set aside execution sale—Irregularity in conducting sale—Inadequacy of price—Inference—Right of suit—Procedure in the absence of fraud—Plaint treated as an application under section* 244.] In a suit brought by a judgment-debtor to set aside a sale held in execution of a decree, he alleged that there were several irregularities in conducting the sale, that the price realised from the sale was too low and that the defendant (decree-holder) acted fraudulently by filing a false affidavit with regard to the property before the sale :—*Held*, that under the circumstances of the case, the reasonable inference was that the property was sold at a price much below its true value in consequence of the irregularities in conducting the sale. *Venkatasubbaraya Chetti* v. *Zamindar of Karvetinagar*, (I. L. R., 20 Mad., 159); *Mahabir Pershad Singh* v. *Dhanukdhari Singh*, (I. L. R., 31 Cal., 815), followed. *Held further*, that in the present case no suit would lie and the plaintiff would have a remedy under section 244, Civil Procedure Code. *Held also*, that the plaintiff's suit should be treated as an application in execution and that the sale should be set aside. *Jhamman Lal* v. *Kewal Ram*, (I. L. R., 22 All., 121); *Briu Mahata* v. *Shyama Churn Khawas*, (I. L. R., 22 Cal., 483); *Lalman Das* v. *Jagan Nath Singh*, (I.L.R., 22 All., 376), followed.

*Sheik Imam Sab* v. *Patail Ajje Gowda* .. .. .. 131

13. ————————, section 253—*Execution of decree against surety—Security given before the passing of decree—Decree allowing defendant to pay by instalments—Surety's liability whether affected by such decree—Indian Contract Act, section* 135.] A surety against whom a decree was sought to be executed, presented a petition alleging that the decree which was passed in the case after he executed the security bond, gave time to the defendant for payment of the decree amount without his knowledge and that he was thereby discharged from liability under section 135 of the Indian Contract Act. The lower Court dismissed the application:—*Held*, that as the security bond did not make any stipulations as to the terms of the decree and also as section 253 of the Civil Procedure Code did not make any distinction as to the nature of the decree, the order of the Munsiff dismissing the surety's application was correct.

*Cundasawmi Modliar* v. *B. Narasimhia Chetty* ... ... 310

14. ————————, sections 253, 336, 337A, 549 and 610—*Execution of Decree—Surety under section 337A for payment of decree debt—Decree-holder—Remedy—Separate suit.*] It would seem from the omission of the Legislature to make an enactment against



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a surety under section 337A of the Civil Procedure Code that the liability is enforceable by a suit and not by a summary remedy. *Balaji* v. *Ramasami*, (I. L. R., 7 Mad., 284); and *Arunachellam* v. *Arunachellam*, (I. L. R.; 15 Mad., 203), followed; *Venkapa Naik* v. *Baslingapa* bin *Kotrabasapa*, (I. L. R., 12 Bom., 411); *Thirumalai* v. *Ramayyar*, (I. L. R., 13 Mad., 1); and *Subjoo Das* v. *Balmukund Das*, (I. L. R., 23 Cal., 212), referred to.

*Muniramaiya* v. *Shamanna* ... ... ... ... 49

15. ——————, sections 253, 545 and 546—*Surety—Enforcement of security—Surety to produce attached property or to pay damages in default—Execution of decree—Separate Suit—Rules published under section* 269, *cl. (b) C.P.C. dated* 12*th October* 1899.] Two sureties had executed a bond undertaking to produce the attached property whenever required by Court and to pay damages out of their property in default. At the instance of the plaintiff (decree-holder), they were called upon to produce the property but failed. The plaintiff (decree-holder) applied to the Court to execute the decree against the sureties but the Munsiff refused. The plaintiff (decree-holder) has preferred this Revision Petition to the Chief Court:—*Held*, that the surety bond executed in this case did not come under any of the sections of the Civil Procedure Code and did not provide for the payment of the decree amount or any portion of it or for the due execution of any definite order of the Court but only made the sureties liable in damages and therefore the liability of the sureties could only be enforced by a regular suit. In the case reported at 22 Madras 268, it was held that the security should be enforced only by a regular suit, in spite of the fact that the security bond had been executed before the decree was passed in the original suit, on the ground that its terms did not bring it within the purview of section 253, Civil Procedure Code. It follows therefore that in the present case, the objection against enforcing the security in execution must be even stronger.

*Rajah Dod Nanjappa* v. *Chennabyrappa* ... ... ... 68

16. ——————, section 257A—*Settlement of decree without sanction by taking a bond from a third party—Suit on bond—Not void under the section.*] *Held*, that following the decision of the Bombay High Court in 23 B., 502, section 257A of the Code of Civil Procedure could not be applied where one of the parties to the agreement was not a party to the decree.

*Mahantha Devaru* v. *Sidde Gowda* ... ... ... ... 64

17. ——————, sections 276, 295—*Attachment of property by one decree-holder—Claim under section 295 by another decree-*

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*holder—Sale of property to attaching creditor pending claim—Validity of sale—Right of claimant to attach same property in execution after sale.*] In execution of a decree, some property belonging to the judgment-debtor was attached and ordered to be sold on 19th December 1902. Before the date fixed for sale, another decree-holder applied for rateable distribution. The attaching creditor purchased the attached property on 29th November 1902 by private sale from the judgment-debtor and reported satisfaction of decree to the Court and the same was accordingly recorded as certified. The 2nd decree-holder applied on 12th December 1902 for attachment of the same property in execution of his decree and attachment was made on 5th January 1903. The purchaser (1st decree-holder) put in a claim which was disallowed by the lower Court. In Revision, it was contended on his behalf that the sale to him was valid and that the judgment-debtor had no interest left in the property on 5th January 1903 which the Court could attach in execution of the second decree:—*Held*, that the sale to the petitioner (claimant) was a valid sale and that the counter-petitioner was not entitled to attach the property after such sale. *Ganga Din* v. *Khushali*, (I. L. R., 7 All., 702); *Durga Churn Rai Chowdhry* v. *Monmohini Dasi*, (I. L. R., 15 Cal., 771); *Manohar Das* v. *Ram Autar Pande*, (I. L. R., 25 All., 481); *Sorabji Edulji Warden* v. *Govind Ramji*, (I. L. R., 16 Bom., 91), referred to.

*Hanumantha Bhatta* v. *Sowcar Krishnappa* ... ... ... 200

18. ————————————, sections 276, 305—*Execution of decree—Attachment of property—Private Sale of attached property—Conditions of section 305, C. P. C. unfulfilled—Effect on sale.*] Where property was under attachment in execution of two decrees, the judgment-debtor with the permission of the Court to effect a private sale, sold the property to plaintiff. Out of the purchase money, plaintiff paid into Court only the amount required to satisfy the decrees of the attaching creditors and the balance was paid to the judgment-debtor. But confirmation of sale by Court was not obtained by the parties. In a suit for the recovery of the property brought by the purchaser it was contended that as the transaction of sale was not confirmed by the Court, it was ineffectual to convey the property to plaintiff and that he had only a lien on it to the extent of the amount actually paid by him to satisfy the decrees together with a fair rate of interest thereon:—*Held*, that a transaction not fulfilling the conditions of the two provisoes (of section 305, Civil Procedure Code) could be only subject to the limitation to the general right of transfering property contained in section 276

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C. P. C. and as the decrees for which the property had been attached had been both satisfied, the sale could not be declared void and ineffectual.

*Venkata Krishniengar* v. *Dod Ramaswamy* ... ... ... 157

19. ———————, section 344—*Insolvency application—Burden of proof.*] Under section 344 of the Civil Procedure Code, a judgment-debtor applied to be declared an insolvent and the lower Court rejected the application on the ground that he was not entitled to be so declared. In appeal, the judgment-debtor contended that the lower Court should have granted his prayer as he had not committed any act of bad faith with regard to his creditors:—*Held*, that it was for the petitioner in the first instance to prove that he was insolvent and that as he had not proved that he was insolvent or that his statements in his petition were substantially true, his application was rightly dismissed. *Baldeo Das* v. *Sukhdeo Das*, (I. L. R., 19 All., 125), followed.

*Mune Gowda* v. *Dodda Ramanna* ... ... ... ... 314

20. ———————, sections 368, 588—*Small cause suit—Death of defendant—Application to be brought on record as representatives—Order refusing permission—Appeal—Civil Procedure Code Amendment Regulation VII of* 1892.] The defendant in a small cause suit having died, some persons alleging themselves to be her daughter's sons applied to the court for permission to be brought on record as the deceased woman's legal representatives; but the application was rejected on the ground that they were not the daughter's sons of the deceased defendant. The petitioners having preferred an appeal against the order, it was:—*Held*, that no appeal could be admitted against the order of the Munsiff on the Small Cause side.

*Munisami* v. *Nanjee* ... ... ... .. ... 191

21. ———————, sections 375, 462—*Guardian—Minor—Compromise made by mother on behalf of her minor son—Razinama decree—Suit to set aside decree—Leave of Court to compromise not expressly obtained—Burden of proof—Decree containing matters not the subject of suit.*] In a suit against a minor son, the mother as his guardian assented to a Razinama and the same was accepted by the Court and a decree passed thereon. The son after attaining majority brought this suit to set aside the decree alleging that 1st defendant had practised fraud on his mother. The suit was dismissed by the Court of First Instance on the ground that the allegation of fraud was not proved.

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In appeal, the plaintiff contended that the Razinama decree should be held altogether void, because it was not shown that the Court ascertained whether the terms of the Razinama were beneficial to the interests of the minor, and also because the decree dealt with matters not then in suit:—*Held*, that the burden of proving that the Court did not consider, approve and sanction the terms of the compromise lay on the plaintiff and as the same had not been discharged, the plaintiff was not entitled to have the decree set aside. *Held further*, that in the present case it was impossible to put the parties back in *statu quo*, *i. e.*, to the position in the original suit and therefore, following the principles set forth in I. L. R., 9 Bom., 365 and I. L. R., 20 All., 98, the plaintiff was also not entitled to have the decree on compromise declared void. *Nirvanaya* v. *Nirvanaya*, (I. L. R., 9 Bom., 365); *Aman Singh* v. *Narain Singh*, (I. L. R., 20 All., 98), followed. *Rajagopal Takkaya Naiker* v. *Muttupalem Chetti*, (I. L. R., 3 Mad., 103); *Jutadhari Lal* v. *Rughoobeer Persad*, (I. L. R., 9 Cal., 510); *Karmali Rahimbhoy* v. *Rahimbhoy Habibbhoy*, (I. L. R., 13 Bom., 137); *Arunachalam Chetty* v. *Meyyappa Chetty*, (I. L. R., 21 Mad., 91); *Virupakshappa* v. *Shidappa* and *Basappa*, (I. L. R., 26 Bom., 109), commented on. *Sinaya Pillai* v. *Munisami Ayyan*, (I. L R., 22 Mad., 289), referred to. *Held also*, that in view of the ruling in 24 Cal., 908, the contention that the decree should be set aside as it embodied matters not then in suit was unsound and that the compromise was rightly embodied in the decree. *Brojodurlabh Sinha* v. *Ramanath Ghose*, (I. L. R., 24 Cal., 908), followed.

*Ramiah* v. *Bhagirathamma* .. ... ... ... 164

22. ———————, section 443—*Minor defendant—Guardian not formally appointed by Court—Ex-parte decree against minor—Court's power to consider the validity of such decree in a subsequent suit.*] In a suit for the transfer of patta of a certain land brought against a minor defendant summonses were served on the houses of the minor and his guardian, and an ex-parte decree was passed as no one appeared for the defendant. As the survey number of the land was wrongly described in that suit, the plaintiff filed the present suit for correcting the mistake and the minor defendant was represented by another guardian who pleaded that the ex-parte decree passed in the previous suit was invalid. The Munsiff overruled the contention of the defendant and decreed the plaintiff's suit. In appeal, the District Judge reversed the lower Court's decree and dismissed the suit. In appeal, the Second appeal, the plaintiff contended that the decree in the previous suit was conclusive:—*Held*, that as the minor could at any time apply to the

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Court to have the decree set aside as invalid, there was no objection to enquire into the same objection in the present case and therefore the decision of the District Judge that the decree in the previous suit was not valid as against the minor, was correct. *Dakeshur Pershad Narain Singh* v. *Rewat Mehton*, (I. L. R., 24 Cal., 25); *Jatindra Mohan Poddar* v. *Srinath Roy*, (I. L. R., 26 Cal., 267), referred to.

*Thimmiah* v. *Hanumanthia* ... ... ... ... 239

23. ——————————, section 456—*Promissory notes executed by mother—Suit thereon against her and her minor sons—Ex-parte decree without personal service of summons on any—Application to set aside the decree—Guardian of minor defendants not formally appointed by Court.*] Two promissory notes were executed in favour of plaintiffs by one Thimmamma and a suit was filed on them by plaintiffs making her and her minor sons defendants in the case. In the plaint, the mother (executant) was described as the guardian of her minor sons. An ex-parte decree was passed, none of the defendants having been personally served. Afterwards the mother filed an application on behalf of her sons, alleging that they were not bound by the decree and also praying that the decree as regards them may be set aside. The Sub-Judge dismissed the application. Thereupon, the mother on behalf of her sons, preferred this Miscellaneous Appeal:—*Held*, that as her interest and that of her sons could not be said to be identical in respect of the subject-matter and as no formal order was passed by the Court under section 456 of the Civil Procedure Code, constituting her a guardian *ad litem*, the ex-parte decree passed against the appellants was set aside.

*Chik Maddayya* v. *Venkataramanaiya* .. .. .. 57

24. ——————————, section 521, clause (*a*)—*Indian Limitation Act, Sections* 5, 12, *Schedule II, Article* 158—*Arbitration—Award, Application to set aside award—Exclusion of time necessary for obtaining copy of award—"Misconduct" of arbitrators.*] In a suit for money some persons were appointed as arbitrators who submitted an award to the Court on 22nd December 1902. The Court was closed for holidays from 24th December 1902 to 8th January 1903. On the re-opening day, *i.e.* 9th January, the defendant applied for a copy of the award and filed his objections on the 10th idem. The Munsiff passed a decree in terms of the award. In appeal, the questions for consideration were, whether the defendant's application to set aside the award was made within the time prescribed by law and whether the arbitrators were not guilty of misconduct within the meaning of section 521 clause (a) of the Civil Procedure Code:—*Held*, that as the copy of the award had

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been applied for on the day the court re-opened after holidays and obtained the next day, the appellant (defendant) was entitled to add the time taken for obtaining the copy and therefore his application for setting aside the award was in time. *Siyadat-un-nissa* v. *Muhammad Mahmud*, (I. L. R., 19 All., 342), followed. *Held further*, that the conduct of the arbitrators in refusing to hear the defendant's witnesses, when tendered by him, was 'misconduct,' within the meaning of section 521 (a), Civil Procedure Code.

*Subbaroyappa* v. *Tataparthappa* ... ... ... ... 266

25. ——————, sections 522, 525 and 622—*Arbitration without intervention of Court—Award—Application to file it—Decree in accordance with award—Appeal—Revisional Powers of Chief Court—Jurisdiction.*] Under an agreement entered into between the parties, they submitted their differences to panchayatdars for settlement. The latter gave an award. The plaintiffs applied to the Court under section 525, Civil Procedure Code, to have the award filed. The Munsiff passed a decree in accordance with the award after considering the objections urged by the defendants against it. The defendants preferred an appeal and it was contended on the other side that no appeal was allowable under the Code in the present case :—*Held*, that the decision of the lower Appellate Court that the appeal was inadmissible under the limitation laid down by section 522, Civil Procedure Code, as the decree of the first Court was in accordance with the award, was correct. *Also*, that there was no illegality or material irregularity in the Munsiff having accepted the award so as to justify an interference with the decree under section 622, Civil Procedure Code. Awards of arbitrators are such proceedings as the Courts ought to strive to uphold and not to go out of the way to discover flaws for rendering them ineffectual. (*See* observations in *Ram Dhan Singh* v *Karan Singh*, (I. L. R., 18, All., 414); Russel on Arbitrators, p. 300.)

*T. Venkatramana Chetty* v. *K. Subbraya Chetty* ... ... 16

26. ——————, sections 558, 622—*Appeal dismissed for default—Application to restore it—Costs—Revisional Jurisdiction.*] On an application by the appellant for the restoration of his appeal which had been dismissed for default, the lower Appellate Court restored it with costs against the respondent. In revision against this order, the respondent contended that the lower Appellate Court was wrong in awarding costs against him :—*Held*, that the District Judge had jurisdiction under section 558, Civil Procedure Code, to make the order in question and that as the same had not been exercised illegally or with material irregularity, there could be

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no revision against such an order. *Parasurama Ayyar* v. *Seshier*, (I. L. R., 27 Mad., 504), referred to.

*K. Rama Rao* v. *Sivappaiya* ... ... ... ... 319

27. ——————, section 617—*Reference to the Chief Court when decree is not final—Not allowed.*] The daughter of a deceased hypothecatee sued for recovery of money from the hypothecated properties without producing a certificate of heirship and the Munsiff feeling doubtful whether a decree could be granted in the case referred it to the Chief Court under section 617, Civil Procedure Code :—*Held*, that as the case was not one in which the decree was final within the meaning of section 617, Civil Procedure Code, it was not open to the Munsiff to make a reference in the case.

*Seshamma* v. *Sundaramma* .. .. .. ... 324

28. ——— ——————, section 662—*Costs—Order directing plaintiffs to furnish security therefor—Suit in forma pauperis—Court of Revision—Powers.*] In a suit for partition in *forma pauperis*, the Court ordered, on the application of the defendant, that the plaintiff should furnish security for defendant's costs. The plaintiff preferred a revision under section 622, Civil Procedure Code :—*Held*, that the District Judge had jurisdiction to make the order in question and that there was no reason for holding that he had improperly exercised his discretion.

*Neelappa* v. *Somanna* ... ... ... ... ... 75

29. ——————, section 623—*Review of Judgment—Rehearing of the whole case discretionary after review is granted—Estoppel*—Res-judicata.] *Held*, that the decision of this court in Miscellaneous Appeal No. 32 of 1901-02 did not amount to a finding that the terms of the decree were in themselves proper, for, such a finding could only be made in an appeal against those terms and therefore that decision did not estop the Company from contending in an appeal against the decree that the terms of the decree were erroneous:—*Held further*, that it was within the discretion of the Court to re-hear the whole case when a review of judgment was granted on a particular ground. *Hurbans Sahye* v. *Thakoor Purshad*, (I.L.R., 9 Cal., 209), followed.

*Chick Devaraj Urs* v. *Sri Lakshmi Narayanaswamy Company Ltd.* ... ... ... ... ... ... ... 321

CIVIL PROCEDURE CODE AMENDMENT REGULATION VII 1892—*See* CIVIL PROCEDURE CODE, sections 368, 588.

COMPROMISE—*See* COURT FEES REGULATION, SCH. II, ART. 1 (*b*).

COMPROMISE MADE BY MOTHER ON BEHALF OF HER MINOR SON—*See* CIVIL PROCEDURE CODE, sections 375, 462.

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CONCUBINE—*See* MAINTENANCE (1).

CONSENT OF BOTH PARTIES OBTAINED IN ORIGINAL COURT—*See* DECREE PASSED WITHOUT A SUCCESSION CERTIFICATE.

CONTRIBUTION SUIT—*Co-owner of a jodi village suing another after division—Tank—Cost of repairs thereto—Payment thereof by the former to Government—When cause of action arises—Limitation—Land Revenue Code—Applicability to suits by private individuals.*] A co-owner of a jodi village sued another in 1902 for contribution of a portion of Rs. 548-6-7, which the former had paid to Government in 1895 for the cost of some repairs which the Government had executed to a tank in the village while it remained under their management, alleging that the cause of action arose in September 1901 when the defendant obtained a decree against plaintiff for his one-sixth of the said village. It was contended that the suit was barred by time. *Held*, that the provisions of the Land Revenue Code which empowered Government to recover certain charges in the same manner in which arrears of Land Revenue might be recovered, did not apply to a claim made by a private individual and that the cause of action, if any, arose in June 1895 when the cost of repairs was paid by plaintiff to Government and therefore the suit was barred.

*Sreedhara Rao* v. *Sreenivasa Rao* ... ... ... ... 35

2. ——————BASED ON AN EXPRESS CONTRACT—*Variance between pleadings and proof—Relief to plaintiff on general principles—Decree when permissible on a different title but for similar relief—Procedure—Indian Contract Act, sections* 70, 78.] One co-sharer of a Kodigi Inam spent some money for the repairs of a tank for the maintenance of which he and the defendant were jointly liable and sued the latter for his share of the cost, alleging that the defendant had expressly agreed to pay. But the plaintiff failed to prove the special agreement. The question for consideration was whether the plaintiff was entitled to succeed on the general liability of the defendant to contribute when he had sued on a special agreement in his plaint:—*Held*, (Justice NANJUNDAYYA (*dissenting*), that in order to save litigation the plaintiff might get a decree on a different title for similar relief provided that all the issues bearing on both titles were raised in the original Court and provided that the determinations in the cause could be founded upon a case either to be found in the pleadings or involved in and consistent with the case made thereby and that the equities and ground of relief originally alleged and pleaded by the plaintiff should not be departed from. *Eshen-*

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*chunder Singh* v. *Shamachurn Bhutto* (11 M. I. A., 7); *Nurul Hossein* v. *Sheosahai Lal* (I. L. R., 20 Cal., 1 (P. C.); *Parashram Va'ad Bapu* v. *Miraji Valad Subhana*, (I. L. R., 20 Bom., 569), approved. *Also*, that as all matters necessary to render defendant liable on the implied contract had been sufficiently dealt with in the findings on the issues on the express contract, the plaintiff was entitled to a decree against the defendant.

*Krishna Bhatta* v. *Vencatachala Bhatta* ... ... ... 112

COSTS—*Second Appeal—Reversal of decree of Lower Appellate Court—Effect—Discretionary powers of Court.*] The plaintiff's suit was dismissed by the Munsiff but without costs. In appeal the District Judge reversed the decree. In Second Appeal the Chief Court reversed the decree of the Lower Appellate Court and dismissed the plaintiff's suit with costs throughout. The plaintiff has preferred this Civil Petition praying for a review of the order of the Chief Court regarding costs in the Munsiff's Court:—*Held*, that the fact that the Appellate Court allowed the plaintiff's claim in reversal of the decision of the Munsiff would have the effect of re-opening the case so far as it related to matters which were not finally adjudicated between the parties in the two Lower Courts. *Held further*, that the question of costs was one of discretion of the Courts, depending on their decision as regards the subject-matter of the suit.

*Hombi* v. *K. Sreenivasa Iyengar* ... ... ... ... 77

2. ———*See* CIVIL PROCEDURE CODE, sections 2, 220, 373 and 588.

3. ———*See* CIVIL PROCEDURE CODE, sections 558, 622.

COURT FEES REGULATION III OF 1900, section 39—*Acquittal of accused—Order for repayment of costs to complainant—Illegal—Criminal Procedure Code, section* 439.] A Magistrate in a criminal case acquitted the accused persons and ordered them to pay costs to the complainant. On a reference:—*Held*, that the order of the Magistrate awarding costs to the complainant when the accused persons were acquitted, was contrary to section 39 of the Court Fees Regulation and therefore must be set aside under section 439, Criminal Procedure Code.

IN THE MATTER OF *Kari Muniga* ... ... ... ... 380

2. ———————————, section 39—*Repayment of stamp and process fees to complainant—Obligatory on convicting Court to order the same.*] The Magistrate of Sagar convicted the accused of offences under sections 352, 355 & 323, Indian Penal Code, and awarded a certainsum of money to the complainant being the ex-

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pense of stamps incurred by him. The Sessions Judge, on appeal, disallowed the same as he was of opinion that the complainant had included some false counts in the charge. In the exercise of the Revisional Powers, the Chief Court :—*Held*, that section 89 of the Court Fees Regulation made it imperative on the convicting Court to order the repayment of the stamp and process fees and therefore the order of the Sessions Judge was set aside.

IN THE MATTER OF *Ramiah*... ... ... ... ... 94

3. ——————————, SCHEDULE II, ARTICLE 1 *(b)—Criminal Court—Compromise—Petition to report to Court—Stamp necessary.*] A petition informing the Court of the compounding of a case and requesting that it may be struck off, properly falls under Art. 1 (b), Schedule II of the Court Fees Regulation and should bear a stamp of eight annas. *Reference under Stamp Act, section* 46, (I. L. R., 8 Madras, 15), followed.

IN THE MATTER OF *Nanjunda Chari*... ... ... ... 96

4. ——————————, SCHEDULE II, ARTICLE 9—*See* MINORS' RULES OF 1872.

COURT OF REVISION—*See* INDIAN PENAL CODE, section 160.

CRIMINAL PROCEDURE CODE, section 33—*Fine—Imprisonment in default of payment thereof—Whether a court is bound to pass such a sentence—Indian Penal Code, section* 64.] Section 64, Indian Penal Code, read with section 33, Criminal Procedure Code, does not appear to require that a sentence of imprisonment should be passed in default of payment of fine.

IN THE MATTER OF *Bharmanna* ... ... ... ... 91

2. ——————————, section 145—*Order by Magistrate under the section—Chief Court setting it aside—Effect of Chief Court's order—Restoration of immoveable property—Mode of help—Disobedience of Magistrate's order—Indian Penal Code, section* 188.] A Magistrate ordered under section 145, Criminal Procedure Code, that petitioner should remain in possession of certain lands. This order was set aside in revision by the Chief Court and afterwards the counter-petitioner applied to the Magistrate for restoration of possession. The Magistrate rejected the petition saying that the effect of the order of the Chief Court was to leave the case in *statu quo* and that there was no provision to order the re-delivery of property and the District Magistrate also concurred in this opinion. The petitioner preferred a Revision Petition to the Chief Court :—*Held, per* Justice RANGASWAMI IYENGAR—that there was no provision for delivery of immoveable property to any individual in the Criminal Procedure Code except that in section 522 which applied only

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to cases where dispossession had taken place in consequence of an offence accompanied by criminal force. *Also*, that as disobedience of an order passed by a Magistrate under section 145, Criminal Procedure Code, would be punishable under section 188, Indian Penal Code, it was a question for the Magistrate to decide whether the continuance of the said petitioner in possession of the property in opposition to the order of this Court did not amount to an offence under section 188, Indian Penal Code. *Goluck Chandra Pal* v. *Kali Charan De*, (I. L. R., 13 Cal., 175), followed. *Tarini Charan Chowdhry* v. *Amulya Ratan Roy*, (I. L. R., 20 Cal., 867), referred to. *Held, per* Justice NANJUNDAYYA—that as section 145 required the Magistrate only to decide which of the parties was in actual possession, there could not logically be any provision in the Code to enforce such order except by prohibiting any interference with such possession. The disobedience of the Magistrate's order forbidding all disturbance of possession would be punishable and that seemed to be all that was necessary.

*Lingaiya* v. *Lingaiya* .. ... ... ... ... 105

3. ——————————, sections 145 and 146—*Dispute regarding land—Order of attachment under section 146—Magistrate's powers under these sections.*] One Kale Gowda who was the pattadar of some land, died leaving a minor widow. The latter's father obtained a certificate of guardianship and took possession of all the deceased man's properties on her behalf and attempted to cultivate the land in dispute which was lying waste for several years and which belonged to the deceased man. A man named Nanje Gowda alleging that he was an undivided cousin of the deceased Kale Gowda claimed possession of the said land and applied to the Magistrate for an order under section 145 of the Criminal Procedure Code. The Magistrate being of opinion that none of the parties was in possession, passed an order of attachment under section 146, Criminal Procedure Code. Against this order, the guardian of Kale Gowda's widow preferred a Revision Petition to the Chief Court:—*Held*, that upon the receipt of the report, the Magistrate acted properly in passing an order under section 145, calling upon the parties to put in statements of their repective claims. *Also*, that there was nothing to prevent the Magistrate who found that neither party was in possession, from getting the land cultivated, in the meantime, by either party or by a stranger upon the execution of a muchilika to him.

*Sambu Gowda* v. *Nanje Gowda* ... ... ... ... 108

4. ——————————, sections 161, 164 and 364—*Statements made before the Police—Recorded in a narrative form—Admissi-*

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*bility—False evidence—Indian Penal Code, section* 193.] The accused was charged with having given false evidence either before a Police Officer under section 161 of the Code of Criminal Procedure or before a Magistrate. He was acquitted because the Magistrate was of opinion that the statement which the accused had made before the police was inadmissible in evidence as it was in a narrative form and did not show what questions were put to him. The Chief Court, in the exercise of its Revisional powers:—*Held*, that the decision of the Chief Court in Criminal Appeal No. 88 of 1899-1900 to the effect that "if the entire statement is made in answer to a single question put to a person by a police Officer under section 161, it is sufficient to render such a person liable for a falsehood contained in such statement," should be followed.

IN THE MATTER OF *Venkatasawmi* ... ... ... ... 88

5. ——————————, sections 176, 476—*Magistrate holding enquiry under section* 176—*Court—Witness examined therein—Order directing his prosecution*—Ultra Vires.] During an enquiry into the cause of death of a certain person under section 176, Criminal Procedure Code, a Magistrate being of opinion that a witness examined before him had committed an offence under section 192, Indian Penal Code, ordered that the witness should be tried for that offence:—*Held*, that a Magistrate, when acting under section 176, Criminal Procedure Code, was not a court; that the only consequence of this conclusion would be that if a prosecution was considered necessary, it would have to be initiated in the manner laid down in section 195 of the Code and not in the more direct one laid down in section 476; and that the order of the Magistrate directing the prosecution of the petitioner should be quashed as it was passed without jurisdiction.

*T. Nanjoondayya* v. *Government of Mysore* ... ... ... 233

6. ——————————, section 180, Illustration (*b*)—*Indian Penal Code, sections* 411 *and* 414—*Foreign Territory—Theft and dishonest retention of stolen property therein—Mysore Courts—Jurisdiction.*] The accused was charged before the Magistrate of Kolar Gold Fields with the offences of theft, dishonest possession of stolen property and assisting in the disposal of stolen property, committed in places beyond Mysore Territory. The Magistrate convicted the accused of offences under sections 411 and 414, Indian Penal Code, and sentenced him to rigorous imprisonment for 6 months. In support of the conviction in appeal, it was contended that the trial was good as the case came within the meaning of Illustration (b) to section 180 of the Criminal Procedure Code:—



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*Held*, that as the local limits within which the cattle were dishonestly retained or disposed of, were not situated within Mysore Territory though outside the Magistrate's jurisdiction, the Illustration (b) of section 180, Criminal Procedure Code, was not applicable and therefore the convictions of the accused under sections 411 & 414, Indian Penal Code, were set aside. *Reg.* v. *Adivigadu*, (I. L. R., 1 Mad., 171), followed. *The Empress* v. *Sunker Gope*, (I. L. R., 6 Cal., 307), distinguished.

*Nallathambi* v. *Government* ... ... ... ... 79

7. ——————, sections 180, 188—*Jurisdiction—Offence committed outside Mysore limits—Conviction of accused by a Magistrate in Mysore—Legality—Surrender of accused by British Government—Waiver of their right to try the accused not proved.*] The 1st appellant was convicted by the City Magistrate of Bangalore of the offence of being in possession of stolen property at Madras under section 411, Indian Penal Code. On appeal :—*Held*, that though the accused person was brought under the Extradition Act from Madras for the offences of house-breaking and theft, yet as it had not been ascertained as required under section 188, Criminal Procedure Code, whether the British Government had waived their right to try him for the offence of receiving stolen property in their own Courts, the conviction of the accused must be set aside. *Held also*, that the provisions of section 180, Criminal Procedure Code, which authorized the trial of the offence of receiving stolen property by the Court within whose limits the property was stolen, could not supersede the proviso to section 188. Per Justice NANJUNDAYYA, that the facts which gave jurisdiction in a case like the present should be specially stated and proved by the prosecution.

*Subbiah Chetty* v. *Government of Mysore* ... ... ... 325

8. ——————, sections 188, 530 clause (p)—*Theft committed in British Territory—Jurisdiction of Magistrates in Mysore to try the accused.*] Where a person committed theft of a bullock in the Dharwar District and brought the same into the limits of Mysore, he was charged with the offence of theft before an Amildar Magistrate and convicted and sentenced to one month's rigorous imprisonment. On a reference by the District Magistrate:—*Held*, that as the accused could not be tried for theft without first ascertaining whether the British Government had waived their right to demand the surrender of the accused, the conviction of the accused in the present case must be quashed as having been passed without jurisdiction under section 530 clause (p) of the Code of the Criminal Procedure.

IN THE MATTER OF *Bheema* ... ... ... ... 328

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9. ——————, section 195—*Sanction to prosecute—Order granting it—Appeal—Court entertaining it.*] Orders giving or refusing sanction to prosecute under section 195, Criminal Procedure Code, are appealable and as appeals from the Court of 1st Class Magistrate of Hassan lie to the Court of the Sessions Judge at Mysore, the petitioners must apply to that Court.

*Nanja Chari* v. *Government* ... ... ... ... 99

10. ——————, sections 236 & 237—*Indian Penal Code, Sections 379 and 411—Separate charges—Conviction under one—Alteration of conviction in appeal—Conviction on one only of two charges does not amount to acquittal upon the other charge.*] The Petitioner was charged by the Police with cutting and removing and also with being in unlawful possession of teak wood from District Forests, offences punishable under sections 379 and 411 I. P. C. The Magistrate upon evidence framed separate charges under sections 379 and 411 but convicted the Petitioner only under section 379. On appeal to the Sessions Judge, the conviction was altered to section 411 and the sentence of imprisonment was reduced. The petitioner in applying for revision of the Judgment of the Sessions Judge, contended that the conviction by the Magistrate only under section 379 although there was a separate charge under section 411, amounted to an acquittal under the latter section and that therefore the interference of the Sessions Judge, was illegal as it practically interfered with an acquittal. On Revision, it was:—*Held*, that the contention was unsound as section 236 of the Code of the Criminal Procedure authorized the Magistrate to frame charges in the alternative and that conviction under one section did not amount to an acquittal under the other.

IN THE MATTER OF *Rama Setty* ... ... ... ... 97

11. ——————, (Act X of 1882), section 240—*Several Charges against the same accused person—Conviction on some of them—Withdrawal of other charges when allowable—Charge, meaning of.*] Three police constables were charged with 26 separate offences of house-breaking and theft in a building in 26 cases before the City Magistrate of Bangalore who convicted them in 10 cases and suspended the enquiry into the remaining 16 cases under section 240 of the Criminal Procedure Code. On a reference by the District Magistrate who doubted the legality of that procedure:—*Held*, per Justice RANGASWAMI IYENGAR, that section 240 of the Criminal Procedure Code (Act X of 1882) was applicable to charges made in more than one criminal case, that the procedure of the Magistrate in the present instance was correct and that therefore no interference in revision was necessary. Per Justice

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NANJUNDAYYA, that section 240 in Act X of 1882 should be construed as being limited in operation to the same trial, but, considering the cases on merits, no further trials appeared necessary even though the order of the Magistrate was to be considered technically wrong.

IN THE MATTER OF *Abdul Gaffur* ... ... ... ... 216

12. ——————————, section 389—" *Successor in office," meaning of.*] A " Successor in Office" in section 389 of the Criminal Procedure Code must mean not only a successor in official name and area of jurisdiction but a successor to the official powers of his predecessor.

IN THE MATTER OF *Thimma*... ... ... ... ... 227

13. ——————————, sections 417, 439—*Acquittal—Order of acquittal—Chief Court's power of revising such order—Revision.*] Although the Chief Court can interfere with an order of acquittal by way of revision to direct a new trial, there must be some reason assigned and made out for such order other than that the Magistrate did not believe the evidence of the witnesses before him. *Queen-Empress* v. *Balwant*, (I. L. R., 9 All., 134), referred to.

*Linga* ... ... ... ... ... ... ... 333

14. ——————————, section 421—*Appeal—Summary dismissal—Order for reduction of sentence notwithstanding—Unenforceable.*] In summarily dismissing an appeal under section 421, Criminal Procedure Code, the Sessions Judge of Mysore ordered that the sentence of fine should be set aside. The Chief Court on revision:—*Held*, that as section 421 of the Criminal Procedure Code allowed the summary rejection of an appeal when the Judge saw no grounds to interfere, the opinion of the Sessions Judge about the reduction of the sentence could not be enforced.

IN THE MATTER OF *Dasa* ... .. ... ... ... 230

15. ——————————, section 488—*Maintenance—Sufficient means.*] *Held*, that the point whether the petitioner had sufficient means as laid down in section 488 to give separate maintenance, did not receive adequate consideration in the hands of the Magistrate, and therefore his present order directing the petitioner to pay Rs. 24 per annum to the counter-petitioner was set aside.

*Eriah* v. *Eramma*... ... .. .. .. ... 107

16. ——————————, section 517—*Order for disposal of property when there is no reason to believe that there has been an offence committed with regard to it—Magistrate's power to act as an arbitrator or order Police to take charge of property as to which the parties appear to have a civil dispute.*] Unless there is reason to

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believe that any offence has been committed with reference to property produced before him, a Magistrate has no authority under section 517, Criminal Procedure Code, to pass any order with reference to any property. A Magistrate has no right to act as an arbitrator between parties or to order the police to take charge of property regarding which the parties appear to have a civil dispute.

IN THE MATTER OF *D. Ranoji* ... ... ... ... 86

17. ——————, sections 517, 520—*Theft of bullocks—Conviction by a 3rd Class Magistrate—Delivery of bullocks to complainant ordered—Appeal—Reversal of conviction by District Magistrate—Order regarding disposal of bullocks undisturbed—Legality—Power to order restoration after delivery.*] A 3rd Class Magistrate convicted the accused of an offence of theft of a pair of bullocks and ordered that the bullocks should be delivered to the complainant. In appeal, the District Magistrate set aside the conviction but declined to interfere with the order of the lower Court regarding the disposal of bullocks. On Revision:—*Held* that as there was no imperative provision that restoration of property should follow a reversal of conviction, it could not be said that the District Magistrate was wrong in declining to set aside the order on the view that he took of the case. *Held also*, that when an order for delivery of property had been carried out, there was no provision in the Code of Criminal Procedure to order restoration. In re *Annapurnabai* (I. L. R., 1 Bom., 630); In re *Ratanlal Rangildas*, (I. L. R, 17 Bom., 748); and *Queen-Empress* v. *Ahmed*, (I. L. R., 9 Mad., 448), referred to.

*Cheluve Gowda* v. *Huchi* ... ... ... ... ... 231

18. ——————, section 537—*Criminal Proceedings—Irregularity—Evidence in one case admitted wholesale in another—Consent of parties—Admissibility—Indian Evidence Act, section 33.*] A Magistrate admitted the evidence in one case wholesale in another without the testimony of any witness whatever being recorded in the latter, with the consent of both parties:—*Held*, that the procedure of the Magistrate was irregular and that mere consent of parties could not legalize an important departure from rules of procedure which were Public Law. *Queen-Empress* v. *Nand Ram*, (I. L. R., 9 Allahabad, 609), referred to.

IN THE MATTER OF *Ranga* .. .. ... ... ... 95

DAMAGES—*See* DECREE.

2. ————FOR LOSS OF BUSINESS AND REPUTATION AGAINST INFORMANT, SUIT FOR—*See* MALICIOUS PROSECUTION.

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3. ———— for Malicious prosecution, suit for—*See* Small Cause Courts.

4. ——— suit for—*See* Bangalore Town Municipal Regulation, 1871, section 101.

5. ————, suit for, for a tortious act against a Niroanti—*See* Land Revenue Code (Regulation IV of 1888), section 229.

6. ————, suit for—*See* Malicious prosecution.

Declaratory Suit—*See* Specific Relief Act, sections 9, 42.

Decree—*Assignment—Effect—Payment of debt to assignor alleged subsequent thereto—Judgment-debtor paying with notice of assignment—Liability of assignor and judgment-debtor—Damages—Cause of action.*] A decree-holder after assigning his decree to another colluded with the judgment-debtor and reported satisfaction of decree to the Court. Thereupon, the assignee sued both his assignor and the judgment-debtor for the recovery of the consideration paid by him for the assignment. The judgment-debtor who was the 2nd defendant in the case contended that the plaintiff had no cause of action against him:—*Held*, that by the written assignment and payment of consideration to the assignor, the title of the assignee was complete though he might not be entitled to execute the decree until the Court recognized the transfer; and that the opinion of the District Judge that the plaintiff had no cause of action against the 2nd defendant was not correct. *Dwar Buksh Sirkar* v. *Fatik Jali*, (I. L. R., 26 Cal., 250), followed.

*Gulam Hussain* v. *Gous Meiya* ... ... ... ... 115

2. ———— affecting property outside territorial jurisdiction—*See* Civil Procedure Code, section 16.

3. ———— containing matters not the subject of suit—*See* Civil Procedure Code, sections 375, 462.

4. ———— on verified plaint without further evidence—*See* Civil Procedure Code, sections 100, 146, 152.

5. ———— passed without a succession certificate.—*Joint trial of two cases—Consent of both parties obtained in original Court—Effect—Legality of procedure objected to in appeal—Right of parties—Appeal—Procedure.*] In an appeal, the Sub-Judge of Mysore remanded the case to the lower Court for recording fresh evidence on the ground that there were some irregularities in it. Against this order of remand the plaintiff preferred an appeal to the Chief Court and contended that as the defendant had not objected to those irregularities in the Court of First Instance, he

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was precluded from doing so in the Appellate Court :—*Held*, that a judgment-debtor was not restrained from questioning in an Appellate Court the legality of the proceedings against him by his consent in the Original Court if he gave such consent *Held also*, that this consent could not make legal proceedings which were not legal.

*Sringeri Mutt* v. *Vencatanaranappa* ... ... ... 195

DEFAMATION—*See* MALICIOUS PROSECUTION.

EASEMENT—*Indian Limitation Act, sections* 3, 26—*Declaratory suit —Right of taking fruit of trees—Limitation.*] The plaintiffs sued to establish their proportionate right to a certain tamarind tree and for recovery of proportionate produce. The defendants pleaded that the tree was entirely theirs and that the suit was barred by the law of limitation :—*Held*, (Justice RANGASWAMI IYENGAR, *dissenting*), that the taking of the fruit of a tree no doubt fell within the definition of "Easement" in the Limitation Act and that the plaintiffs' suit had become time-barred.

*Ramiah* v. *Narasingappa* ... ... ... ... ... 126

EVIDENCE—*See* REGISTRATION ACT, 1877, section 17 (*b*).

2. ————*See* STAMP REGULATION II OF 1900, sections 2 (22), 36, SCH. I, ARTS. 47, 12 (*b*).

EXECUTION OF DECREE—*Attachment of moveable property—Bullocks—Amin entrusting them to a person for safe custody—Feeding charges incurred by custodian—Separate suit not necessary—How such charges are recoverable.*] A person to whom the Amin had entrusted some bullocks which were seized by him in execution of a decree, applied to the Court executing the decree for payment of feeding charges incurred by him while the bullocks remained in his custody. The Munsiff rejected the petition and directed the petitioner to sue for the money. The petitioner (custodian) presented this Revision Petition to the Chief Court :—*Held*, that, following the ruling of this Court in Civil Revision Petition No. 5 of 1900-01, which was to the effect that "it is incumbent on the Court to see that the proper payment is made and that the matter should be enquired into without requiring a separate suit to be brought for the purpose," the order of the Munsiff was set aside.

*Hanumantha Rao* v. *Pantangee Ramaiya* ... ... ... 72

2. ————————*See* CIVIL PROCEDURE CODE, sections 276, 305.

3. ———————— AGAINST SURETY—*See* CIVIL PROCEDURE CODE, section 253.

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EXECUTION SALE, SUIT TO SET ASIDE—*See* CIVIL PROCEDURE CODE, section 244.

FALSE CHARGE—*See* INDIAN PENAL CODE, sections 182 and 211.

FRAUD—*See* INDIAN LIMITATION ACT, 1877, section 18, SCHEDULE II. ARTICLE 62.

2. ——ALLEGED BUT NOT PROVED—*See* CIVIL PROCEDURE CODE, section 16.

FRUIT OF TREES, RIGHT OF TAKING—*See* EASEMENT.

GIFT WHEN PASSING TITLE—*See* HINDU LAW (5).

GUARDIAN—*See* CIVIL PROCEDURE CODE, sections 375, 462.

GUARDIAN NOT FORMALLY APPOINTED BY COURT—*See* CIVIL PROCEDURE CODE, section 443.

HEIRSHIP CERTIFICATE—*Promissory note in favor of a Hindu father —Suit by undivided sons—Plaint allegation that it was joint family property—Order directing production based on language of document merely—Unsustainable.*] In a suit brought by sons on a promissory note executed by defendant in favour of their father, the Munsiff held that a certificate of heirship was necessary as there was nothing in the document to show that the sons had equal rights to the money which their father had lent to the defendants. On Revision, it was:—*Held*, that the plaintiffs were not bound to take out a certificate of heirship if the promissory note in suit belonged to the joint family property of the plaintiffs and their deceased father as alleged in the plaint and that, this being a question of fact which must be enquired into and determined by the Munsiff before he could insist upon its production, his present order was set aside.

*Sivaramappa* v. *Nadiga Thimappa* ... ... ... 76

HINDU LAW—*Alienation by a Hindu wife—Husband becoming an ascetic and leaving property in possession of wife—Adverse possession of wife for twelve years—Binding character of such alienation as regards husband and his alienees—Limitation.*] Some properties which had been hypothecated to plaintiff by a Hindu wife (defendant No. 1) were subsequently gifted away by her husband (defendant No. 2) to other persons. In a suit on the hypothecation bond, the plaintiff alleged that as defendant No. 2 had long ago become a religious ascetic, his wife (defendant No. 1) had become the sole owner of the properties and that the debt was binding on defendant No. 2 and his donees. The defendants Nos. 2, 3 and 4 contended that defendant No. 1 had no right to hypothecate the properties and

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that the debt was not binding on them:—*Held*, (Justice NANJUNDAYYA, *dissenting*), that as defendant No. 2 renounced the world and lived as an ascetic leaving his wife (defendant No. 1) as the ostensible and unquestioned owner of his rights to his properties, her adverse possession for 12 years from about 1877 was sufficient to give her a title and to forfeit that of defendant No. 2, under the ordinary rule as to title by prescription.

*Chick Mariamma* v. *Vencatasamappa* ... ... ... 258

2. ———*Hypothecation of family properties by a Hindu mother—Son's liability for the debt.*] The plaintiff sued the defendant for the recovery of some money by the sale of some immoveable properties which had been hypothecated to him by the defendant's mother and the defendant contended that his mother was not competent to alienate those properties and that they were not liable for the debt due to plaintiff:—*Held*, that as the defendant's mother had no right to the properties and as there was nothing to show that she contracted the debt as guardian of the defendant when a minor or as his agent since, the mere fact that she was allowed to be in possession and management of the property did not empower her to encumber the property and therefore the plaintiff's suit must be dismissed.

*Thimiya* v. *Kaparti Subbayya* ... ... ... ... 244

3. ———*Joint family—Purchaser of an undivided member's share in family property—Court sale—Rights of such purchaser—Partial partition of family property, suit for—Maintainability—Form of suit and decree in such a case.*] The plaintiff purchased the share of a member of an undivided Hindu family in a house at a sale held in execution of a decree against him. He subsequently brought a suit for partition and delivery of possession of one-half of the house purchased by him after determining the judgment-debtor's share in the properties mentioned in the plaint schedule. It was contended by the defendants that the plaintiff's suit was not maintainable as it did not include all the properties which the family possessed:—*Held*, that the alienability of an interest in the joint family property had long been taken for granted in the State, and that it was too late now to question its propriety and therefore that the contention that the suit was not maintainable had not been made out. *Held further*, that it was unnecessary to apply to an auction-purchaser of family property the prohibition against seeking partial partition, as he was neither interested nor quite in a favourable position to discover all the items of family property in cases in



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which the real coparceners were either indifferent about effecting or unwilling to effect a final partition among themselves.

*Lemaji Mylarappa* v. *N. Siddoji Rao* ... .. ... 43

4. ——— —*Joint Hindu Family—Hindu widow—Maintenance—Suit by sister-in-law against brother-in-law—Death of plaintiff's husband prior to his father's death—Father-in-law's properties inherited by brother-in-law—Legal obligation of heir—Refusal of widow to live with her brother-in-law—Effect on her claim.*] An undivided member of a joint Hindu family died leaving his widow (plaintiff), father and a brother (defendant). After the father's death the widow sued her brother-in-law for separate maintenance alleging that all her father-in-law's properties had been inherited by the defendant who was in possession of them at the time of suit. It was contended by the defendant that the properties in his possession were all self-acquired and that he was not liable to allot a separate maintenance to the plaintiff:—*Held*, that as the defendant's father was found to have left some property at his death and as the defendant kept back his father's accounts, he must be taken to have continued his father's trade and therefore the plaintiff had a claim on him for maintenance. *Janki* v. *Nand Ram*, (I. L. R., 11 All., 194); *Rangammal* v. *Echammal*, (I. L. R., 22 Mad., 305), approved. *Held also*, that plaintiff was entitled to retain her maintenance even after leaving her husband's house, unless she was guilty of unchastity or other disreputable practices. *Sri Maniyam Mahalakshmamma Garu* v. *Sri Maniyam Venkataratnamma Garu*, (I. L. R., 6 Mad., 83); *Siddessury Dassee* v. *Janardan Sarkar*, (I. L. R., 29 Cal., 557), followed.

*Rachiah Setty* v. *Nanjamma* ... ... ... ... 134

5. ———*Specific Relief Act*, sections 9, 42—*Declaratory suit—Suit for declaration of title and confirmation of possession—"Consequential relief"—Maintainability—Gift when passing title.*] The first defendant obtained a decree for possession under section 9 of the Specific Relief Act against the plaintiff who was in possession of the suit land. Subsequently before the decree was executed by the first defendant, the plaintiff brought a suit against her for a declaration of his title to the suit land and for confirmation of his possession of the same. The 1st defendant contended among other things that the suit being merely for a declaration was not maintainable. The lower Appellate Court upheld the contention and refused to give plaintiff an opportunity to amend the plaint. In Second Appeal:—*Held*, that there was nothing in the terms of section 9 of the Specific Relief Act which required that a prayer to recover possession should be attached to a prayer for establishment of title

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if the plaintiff was already in physical possession. *Held further*, that the plaintiff's prayer for a decree that his possession may not be disturbed amounted to a prayer for an order in the nature of an injunction, a prayer for consequential relief under section 42 of the Specific Relief Act. *Held also*, that in order to complete a gift and make it valid such that the donee would acquire a title which he could convey, it was necessary that the donor should have done all that she could to complete the gift and that since the 1st defendant did not give the donee possession and withdrew her gifts subsequently, the gift was intentionally never completed by the 1st defendant and therefore it passed no title.

*Naranappa* v. *Lingamma* ... ... ... ... ... 247

6. ———— *Widow—Adoption—Authority to adopt given by husband—Second adoption on the death of first adopted son—Validity—Selection of a boy, restrictions regarding—Binding charactor thereof—Will, construction of—Law applicable to Mysore.*] Under a Will left by N, a Hindu, his widow L was authorized to take a boy in adoption and if the adopted boy misbehaved to adopt another boy. Accordingly L adopted a boy who died unmarried a few years after the adoption. L then adopted her brother's son K. Subsequently the brother's sons of N sued for a declaration that the second adoption made by L was invalid and that they were the rightful heirs to the property left by N and also for possession of those properties. The lower Court passed a decree in favour of plaintiffs. In appeal it was contended on behalf of the adopted son that the adoption was valid and that the construction put upon the Will left by N by the lower Court, was erroneous:—*Held*, that the Will empowered the widow to make several adoptions for the purpose of continuing the testator's lineage and estate. *Held further*, (Justice RANGASWAMI IYENGAR, *dissenting*), that the Will did not contain any restrictions concerning the selection of any particular boy, that the widow was within her power to make the adoption in question and that the adoption of K was valid. Per Justice RANGASWAMI IYENGAR, that the instructions contained in the Will regarding the selection of a boy for adoption must be considered as mandatory in the case of the widow and that as she had failed to follow those instructions the adoption made by her was not valid. The law of adoption found by the British Courts to be applicable to Southern India must be held applicable in this State.

*Krishnaswami* v *Narasimha Murthy* ... ... ... 268

HYPOTHECATION—*Interest after due date—Property made liable for principal and interest till repayment—Interest from date of decree*

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*to date of payment—Liability of hypothecated property therefor—Civil Procedure Code, section* 209—*Indian Limitation Act, Schedule II, Article* 116.] In a suit for money due on a hypothecation bond, the lower Court passed a decree awarding plaintiff interest on the balance of principal at the rate stipulated in the document up to date of suit, further interest thereon at 12 per cent per annum from date of suit to date of decree and also further interest thereon from date of decree to date of payment against the hypothecated property. The purchaser of the hypothecated property who was defendant No. 7 in the case contended in appeal that the lower Court erred in awarding interest after due date and in making the properties liable therefor and that the lower Court should not have decreed interest at 12 per cent per annum from the date of suit and further interest from the date of the decree against the hypothecated properties:—*Held*, that under the document the stipulation for payment of interest was unlimited and the property was hypothecated generally for the amount which might become due and therefore the interest stipulated must be considered to be due till payment of principal and the property hypothecated for the total amount. *Narindra Bahadur Pal* v. *Khadim Husain*, (I. L. R., 17 All., 581); *Rikhi Ram* v. *Sheo Parshan Ram*, (I. L. R., 18 All., 316); *Gudri Koer* v. *Bhubaneswari Coomar Singh*, (I. L. R., 19 Cal., 19), distinguished. *Held further*, that in the present case as the property was hypothecated for principal and interest thereon till payment, there was nothing in section 209, Civil Procedure Code, to prevent the Court from making interest till payment a charge upon the property in accordance with the agreement between the parties. *Bhawani Prasad* v. *Brij Lal*, (I. L. R., 16 All., 269), not followed.

*A. C. Devaraja Urs* v. *Hanumantia Maistry* ... ... ... 298

2. ———— ————*Property in possession of mortgagor—Damage done to it by third parties—Right of mortgagee to sue them.*] The plaintiff sued for recovery of money due on a hypothecation bond and two persons who had caused damage to the hypothecated property were also made parties to the suit. It was contended on behalf of the latter that they were wrongly joined as defendants and that they were not liable to make good the damage caused by them:—*Held*, Per Justice Rangaswami Iyengar, that even a simple mortgagee would have the right to claim that value of damages caused to the mortgaged property should be security for the satisfaction of his debt when the property was insufficient to meet the same. Per Justice Nanjundayya, that the interest of a simple mortgagee in the mortgaged property was as real and certain as that of a reversioner and therefore there was no reason whatever

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why the wrong to him in such a case as the present should go without a remedy.

*Ramiah* v. *Basaviah* ... ... ... ... .. 18

3. ——————*Purchase by hypothecatee of a portion of hypothecated property—Suit for recovery of money due on the bond from the rest of the property—Plea that purchased property should be liable for decree amount* pro rata—*Interest from date of suit to date of decree.*] On the 19th November 1895, 1st defendant's father executed a registered hypothecation deed in favour of plaintiff for Rs. 7,375. Two items of the hypothecated property were purchased by the plaintiff from the 1st defendant's father for Rs. 2,970. The plaintiff sued to recover a sum of Rs. 8,478-11-10 being the amount due under the bond from the remaining items of the hypothecated property. The 1st defendant contended that the property purchased by the plaintiff should be made liable to the decree amount *pro rata*:—*Held*, that the sale effected between the parties was not of the equity of redemption but of the property independent of the hypothecation lien and therefore the 1st defendant was not entitled to claim that those items should be made liable to the amount claimed in suit or that plaintiff should be compelled to proceed against them in the first instance. *Fakiraya* v. *Gadiyaya*, (I.L.R., 26 Bom., 88); *Bisheshur Dial* v. *Ram Sarup*, (I. L. R., 22 All., 284); *Chicka Hallay Gowda* v. *Jogy Gowda*, (3 Mys. Ch. Ct. R., 6), distinguished. *Held also*, that the plaintiff's claim for interest at 12% from date of suit to date of decree must be allowed as the question was concluded by a decision of the Chief Court. *Lakshminaranappa* v. *Srirungia*, (4 Mys. Ch. Ct R., 58), followed.

*Nanjappa* v. *Narasimhaswami* ... ... ... ... 189

——————BOND—*Hypothecatee borrowing money by pledging it—Right of pawnee or his assignee to proceed against hypothecated property.*] Defendants Nos. 3 and 4 borrowed Rs. 6,000 from defendant No. 1 on the security of some immoveable property. The latter in his turn borrowed a similar sum from defendant No. 2 and pledged the hypothecation bond executed in his favour by defendants Nos. 3 and 4 and also another bond executed by defendants Nos. 5 to 7. The defendant No. 2 assigned the first bond over to plaintiff who sued for the recovery of the money from defendant No. 1 and from the sale of the hypothecated property. The Sub-Judge granted a decree as prayed for by plaintiff. In appeal, it was contended that the decree as regards the hypothecated property was not valid. *Held*, that as defendant No. 2 was simply a creditor of defendant No. 1 and got possession of the bond as a security for the



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repayment of the loan, his assignee (the plaintiff) was entitled to realize his debt by selling the securities but had no direct claim against the debtors of defendant No. 1.

*Sree Lakshmi Narayanaswami Company Ltd.* v *Chika Devaraj Urs....* ... ... ... ... ... ... ... 36

——————OF SEVERAL PROPERTIES—*Decree against some—Execution—Objection by judgment-debtor before executing Court—Untenable.*] In a suit on a hypothecation bond, the plaintiff omitted to claim relief against a house which was also included in the bond and a decree was passed as prayed for. In execution of the decree, one of the judgment-debtors contended that the decree-holder should first proceed against the house referred to in the suit bond though it was not included in the plaint schedule. The Munsiff declined to go behind the decree and disallowed the objection. The judgment-debtor preferred this Miscellaneous Appeal.—*Held*, that the Order of the Munsiff was correct. *Ram Dhun Dhur* v. *Mohesh Chunder Chowdhry*, (I. L. R., 9 Cal., 406); *Moro Raghunath* v. *Balaji Trimbak*, (I. L. R., 13 Bom., 45), distinguished.

*Siddabasappa* v. *Erra Guntappa* .. .. .. .. 52

INDIAN CONTRACT ACT, section 56 —*Suit for rent—Compulsory evacuation of shops by Plague Authorities—Tenancy how affected.*] The defendant who had taken up some mandi shops from plaintiffs on rent was forced to evacuate them by the Plague Authorities under an order of Government. When the plaintiff sued for arrears of rent the defence was that the liability to pay rent had ceased as the defendant was not in possession of the shops. *Held*, that the occupation of the shops became impossible by reason of the order of the Plague Authorities insisting upon their evacuation, and therefore the tenancy really came to an end when they were ordered to be evacuated. *Merwanji Mancherji Cama* v. *Syed Sirdar Ali Khan*, (I. L. R., 28 Bom., 510), distinguished.

*Narappa* v. *Ramayya* ... ... ... ... ... 170

2. ——————, section 135—*See* CIVIL PROCEDURE CODE, section 253.

3. ——————, section 251—*Partnership—Agreement to supply funds for the business—Partners' liability for acts done by their co-partner—Agency, presumption of—Acknowledgment—Indian Limitation Act, section 19.*] In a suit for money due on a "hundi" drawn by one co-partner on another, the defence of the co-partners other than the drawer of the "hundi" was that they were not bound by the acts done by their co-partner without their authority. The suit was decreed by the first Court. On appeal, the District

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Judge reversed the lower Court's decree and dismissed the suit on two grounds *viz.*, that the plaintiffs had not proved that the money borrowed from them was used for the contract work and that the acknowledgment of plaintiffs' debt made by defendant No. 1 was also not binding on the other defendants:—*Held*, that as the act of drawing the "hundi" had been done in the ordinary course of business by defendant No. 1 who was in charge of the partnership business for which defendants Nos 2 and 3 had agreed to supply funds, the latter were also bound by the transaction. *Held also*, that there being an active partnership in a going concern, the authority of defendant No. 1 as agent to bind the other partners must be presumed as an ordinary rule. *Premji Ludha* v. *Dossa Doongersey*, (I. L. R., 10 Bom., 358), referred to.

*Gangaram* v. *Batni Seshagiri Row* ... ... ... ... 245

INDIAN EVIDENCE ACT, sections 32 cl. (2) & 34—*Account books—Corroborative evidence necessary to render defendant liable upon entries in plaintiff's books—Relevancy of such entries under section 32, I. E. Act—Legal evidence.*] The contention that entries in plaintiff's accounts are not by themselves sufficient to prove the items is sound and borne out by the case quoted at 18 Allahabad, 92. The entries in the accounts are relevant not only under section 34, Indian Evidence Act, as entries in books of account regularly kept in the course of business but they may also be relevant under section 32, clause (2) as statements made by persons whose attendance could not be secured for examination as witnesses without unreasonable delay and expense. In this view they serve as evidence capable of establishing the fact which they recorded.

*Thimmaiya* v. *M. Kasim Aboo Baker Sait* ... ... ... 62

INDIAN LIMITATION ACT, sections 3, 26—*Declaratory suit—Right of taking fruit of trees—Easement—Limitation.*] The plaintiffs sued to establish their proportionate right to a certain tamarind tree and for recovery of proportionate produce. The defendants pleaded that the tree was entirely theirs and that the suit was barred by the law of limitation:—*Held*, (Justice RANGASWAMI IYENGAR, *dissenting*), that the taking of the fruit of a tree no doubt fell within the definition of "Easement" in the Limitation Act and that the plaintiffs' suit had become time-barred.

*Ramiah* v. *Narasingappa* .. .. .. .. .. 126

2. ——————————, sections 5, 12, Sch. II, Art. 158—*Arbitration—Award—Application to set aside award—Exclusion of time necessary for obtaining copy of award—"Misconduct" of arbitrators—Civil Procedure Code, section 521, clause (a).*] In a suit for money some persons were appointed as arbitrators who submitted

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an award to the Court on 22nd December, 1902. The Court was closed for holidays from 24th December 1902 to 8th January 1903. On the reopening day, *i. e.* 9th January, the defendant applied for a copy of the award and filed his objections on the 10th idem. The Munsiff passed a decree in terms of the award. In appeal, the questions for consideration were, whether the defendant's application to set aside the award was made within the time prescribed by law and whether the arbitrators were not guilty of misconduct within the meaning of section 521, clause (a) of the Civil Procedure Code:—*Held*, that as the copy of the award had been applied for on the day the Court reopened after holidays and obtained the next day, the appellant (defendant) was entitled to add the time taken for obtaining the copy and therefore his application for setting aside the award was in time. *Siyadat-un-nissa* v. *Muhammad Mahmud*, (I. L. R., 19 All., 342), followed. *Held further*, that the conduct of the arbitrators in refusing to hear the defendant's witnesses, when tendered by him, was 'misconduct' within the meaning of section 521 (a), Civil Procedure Code.

*Subbaroyappa* v *Tataparthappa* ... ... ... ... 266

3. ——— ——— ———, 1877, section 18, Schedule II, Article 62—*Money due to plaintiff wrongly received by defendant—Suit for its recovery after three years from date of receipt—Limitation—Fraud.*] On 19th January 1901, plaintiff brought a suit for the recovery of some money from the defendant (his daughter-in-law) alleging that the amount which was due to him from one Muniappa had been wrongly received by her on 15th October 1897. The defence was that the suit was time-barred:—*Held*, that a suit for money payable by the defendant to plaintiff for money wrongly received by defendant which was really due to the plaintiff came within Article 62, Schedule II of the Limitation Act, 1877, and therefore the present suit was time-barred as it was not brought within three years from the date of receipt of money. *Raghumoni Audhikary* v. *Nilmoni Singh Deo*, (I. L. R., 2 Cal., 393); *Vishnu Bhikaji Phadke* v. *Achut Jagannath Ghate*, (I.L.R., 15 Bom., 438); *Thakur Prasad* v. *Partab*, (I. L. R. 6 All., 442); *Banoo Tewary* v. *Doona Tewary*, (I. L. R., 24 Cal., 309), followed. *Held also*, that section 18 of the Limitation Act could only apply when the rightful owner was kept from the knowledge of his rights by an industrious and artful concealment and not by mere omission of the wrongful possessor to notify the rightful owner of the wrongful possession and that the present case where the plaintiff had not alleged any facts constituting fraudulent concealment was not governed by that section.

*Seshamma* v. *Rama Char* ... ... ... ... 145

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4. ———————————, section 19—*See* INDIAN CONTRACT ACT, section 251.

5. ———————————, sections 19 and 20—*Suit on a bond—Payment of interest—Endorsement without actual payment—Acknowledgment within the meaning of section 19.*] A suit for the recovery of money due on a bond brought within three years from the date of an endorsement thereon to the effect that a few rupees were paid towards interest was dismissed by the Munsiff on the ground that actual payment was made one year after the endorsement when the time for the recovery of the debt had become barred. The plaintiff preferred this Revision Petition :—*Held*, that there was no warrant for narrowing the scope of section 20 of the Indian Limitation Act by interpreting it to apply only to actual payment of interest in cash or kind and therefore the decision of the Munsiff on the question of limitation was set aside.

*Rangaswamaiya* v. *Ramalinga Sastry* ... ... ... 70

6. ———————————, XV of 1877, section 21—*Surety—Payment towards principal and interest by debtor only—Endorsement of payments in surety's handwriting—Effect on surety's liability—Limitation.*] In a suit for the recovery of Rs. 300 due under an unregistered hypothecation bond executed by the 1st defendant, a person who had stood security for the repayment of the debt was added as 2nd defendant in the suit. The latter pleaded that the suit was time-barred as against him, on the ground that he had not himself made any payment within the period of limitation :—*Held*, that it could not be said that the mere act of the 2nd defendant's writing the endorsement or attesting some of the endorsements as a witness could amount to an act calculated to affect him with liability as a payer of interest and therefore the District Judge was right in holding that the claim was barred as against the 2nd defendant.

*K. Swamyroya Char* v. *N. Gopalappa* ... ... ... 118

7. ———————————, section 22—*Non-joinder of parties—Joinder of co-plaintiff after expiry of time, effect of—Suit to recover a debt brought by one of two persons jointly entitled to sue.*] Where two undivided brothers were jointly entitled to recover a debt due to their deceased father, one of them alone brought a suit and when objection was taken by the defendants on the ground of non-joinder of parties, the other brother was added as co-plaintiff. The defendants contended that the suit was time-barred as more than three years had elapsed since the date of the bond when the other brother

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was added as co-plaintiff:—*Held*, that as the two plaintiffs were jointly entitled to the debt as members of an undivided Hindu family, the 1st plaintiff could not sue alone and therefore the claim was barred under section 22 of the Limitation Act when the 2nd plaintiff was added as a co-plaintiff. *Held also*, that the 1st plaintiff was not entitled to recover at least half the amount sued for as he could not claim in this suit his half share in the joint family property.

*Doddu Timma* v. *Mutta* ... ... ... .. ... 236

8. ——————, Schedule II, Article 63—*Suit for balance of principal and interest due on a bond—Interest—Cause of action.*] On 18th February 1895 the defendant executed a bond for Rs 2,600 in favour of plaintiff's assignor in which he had agreed to repay the loan and interest before 11th March 1899. The debt was subsequently discharged by instalments and on 6th May 1898 the plaintiff's assignor prepared a patti which showed a sum of Rs. 386-8-10 as due from the defendant. The bond was assigned over to plaintiff on 4th March 1902 and the present suit was filed on 11th March 1902. The Munsiff decreed the suit and, on appeal, the District Judge having found that the principal had been fully repaid on the date of the patti, modified the decree by awarding only a portion of the suit amount being the interest due under the bond. In Second Appeal, it was contended by the defendant that as the whole of the principal amount had been repaid long before 6th May 1898, the claim for arrears of interest also was time-barred:—*Held*, that as the principal was repaid before the commencement of Vilambi and also as interest was calculated only up to May 1898, the latest date of cause of action for the arrears of interest could not be later than that and therefore the suit was barred under Article 63, Schedule II of the Limitation Act.

*Raghubhushana Teertha Sreepadangalavaroo* v. *A. Lakshminaranappa* ... ... ... ... ... ... 243

9. ——————, Schedule II, Articles 132 and 147—*Hypothecation as distinguished from mortgage—Limitation.*] In a suit on a hypothecation bond brought by plaintiff alleging some subsequent payments by defendant towards interest, the latter denied those payments and pleaded that the suit had become barred by time. *Held*, that Article 147 applied to a transaction in which it was open to one party to sue for redemption and for the other party to sue for foreclosure or sale, that a hypothecation did not admit of such reciprocal rights and that suits upon hypothecation bonds for money were governed by Article 132. *Also*, that the Chief Court had invariably been of opinion, like the High Courts of Madras and

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Calcutta, that a hypothecation created only a charge upon immoveable property and that it was different from a mortgage.

*Madaiya* v. *Anke Gowda* ... ... ... ... ... 11

10. ——————, Schedule II, Article 134—*Mortgage—Purchase from mortgagee—Suit for redemption by original mortgagor's sons—Adverse possession of purchaser.*] A certain land was mortgaged by plaintiffs' father to R in 1878. The 1st defendant purchased the land from R's undivided father under a registered sale deed dated 11th April 1881. The original mortgagor's sons filed the present suit for redemption in Februrry 1901 against the purchaser and other persons who were in possession of the land. The defence was that the suit was barred by limitation:—*Held*, that the plaintiffs' suit was time-barred under Article 134 of Schedule II of the Limitation Act and must be dismised. *Yesu Ramji Kalnath* v. *Balkrishna Lakshman*, (I. L. R., 15 Bom., 583), referred to.

*Thimmareyappa* v. *Hanumantha* ... ... ... ... 306

11. ——————, Articles 178A and 177A—*Adjustment of decree out of Court—Enquiry into the truth thereof—Judgment-debtor's application therefor within one year from the date of adjustment—Article applicable to such a case.*] The Judgment-debtor's application to enquire into the truth of the adjustment was made within one year from the date of such adjustment and consequently was not barred under Article 177A of the Limitation Act. Article 178A of the Regulation does not apply, because the time begins to run under that clause from the date of service of a notice in execution upon the applicant, and, in this case such a notice does not appear to have been served on him.

*Venkata Subba Setty* v. *Venkata Setty* ... ... ... 48

12. ——————, 1877, Schedule II, Article 179 (4)—*Step in aid of execution—Certificate of Court transferring decree to another Court for execution—Civil Procedure Code, sections 228, 224.*] On an application presented under section 228, Civil Procedure Code, for the transfer of a decree to another Court for execution, the Court passed an order transferring the decree on 25th October 1900. But the certificate which accompanied the order was dated 3rd January 1901. The present application for execution was presented on 17th December 1903. It was disallowed by the Lower Court as being time-barred. In appeal, it was contended that the fact of the certificate being dated 3rd January 1901 constituted a step in aid of execution and that the application was within time:—*Held*, that after the appellant's application under section 228, Civil Pro-

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cedure Code, was presented, it was the duty of the Court to proceed under section 224 of its own motion and that as there was nothing from which a step in aid of execution could be inferred to have been taken by the appellant, further execution was barred by the provisions of Art. 179 (4) of Schedule II, Limitation Act, 1877. *Koormayya* v. *Krishnamma Naidu*, (I. L. R., 17 Mad., 165), distinguished.

*Rangashesha Shastry* v. *Ramaswamaiya* ... ... ... 193

INDIAN PENAL CODE, section 64—*Criminal Procedure Code, section 33—Fine—Imprisonment in default of payment thereof—Whether a Court is bound to pass such a sentence.*] Section 64, Indian Penal Code, read with section 33, Criminal Procedure Code, does not appear to require that a sentence of imprisonment should be passed in default of payment of fine.

IN THE MATTER OF *Bharmanna* ... ... ... ... 91

2. ——————, section 160—*Right of private defence—Plea set up in revision—Court of Revision.*] The petitioner along with several others was convicted by the Amildar-Magistrate of Mysore of the offence of committing an affray under section 160, Indian Penal Code. The conviction was confirmed in appeal by the District Magistrate of Mysore. In a revision petition presented by accused No. 7, it was contended on his behalf that he was acting merely in self-defence:—*Held*, that as the accused had neither pleaded nor proved before the Amildar-Magistrate that he was acting in self-defence, such a plea could not be admitted in revision. *Queen-Empress* v. *Timmal*, (I. L. R., 21 All., 122), followed.

*Kundarama Gowda* v. *Government of Mysore* ... ... 384

3. ——————, sections 182 and 211—*False charge—False charge made to Police—Sanction to prosecute therefor—Unnecessary.*] The accused were charged before the 1st Class Magistrate of Tumkur with offences under section 182 and 211, Indian Penal Code. The Magistrate convicted and sentenced the accused under section 182, Indian Penal Code, remarking that he considered it unsafe to frame a charge under section 211, in the absence of the Magistrate's sanction:—*Held*, that as the false charge in this case was not committed in or in relation to any proceeding in any Court, no previous sanction was necessary to prosecute the accused therefor. *Ramasami* v. *The Queen-Empress*, (I. L. R., 7 Mad., 292); *Karim Buksh* v. *The Queen-Empress*, (I. L. R., 17 Cal., 574); *Imperatrix* v. *Jijibhai Govind*, (I. L. R., 22 Bom., 596), followed.

*Huchey Gowda* v. *Government* ... ... ... ... 81

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4. ———————— section 188—*Criminal Procedure Code, section 145—Order by Magistrate under the section—Chief Court setting it aside—Effect of Chief Court's order—Restoration of immoveable property—Mode of help—Disobedience of Magistrate's order.*] A Magistrate ordered under section 145, Criminal Procedure Code, that petitioner should remain in possession of certain lands. This order was set aside in revision by the Chief Court and afterwards the counter-petitioner applied to the Magistrate for restoration of possession. The Magistrate rejected the petition saying that the effect of the order of the Chief Court was to leave the case in *statu quo* and that there was no provision to order the re-delivery of property and the District Magistrate also concurred in this opinion. The petitioner preferred a Revision Petition to the Chief Court:—*Held, per* Justice RANGASWAMI IYENGAR, that there was no provision for delivery of immoveable property to any individual in the Criminal Procedure Code except that in section 522, which applied only to cases where dispossession had taken place in consequence of an offence accompanied by criminal force. *Also,* that as disobedience of an order passed by a Magistrate under section 145, Criminal Procedure Code, would be punishable under section 188, Indian Penal Code, it was a question for the Magistrate to decide whether the continuance of the said petitioner in possession of the property in opposition to the order of this Court did not amount to an offence under section 188, Indian Penal Code. *Goluck Chundra Pal* v. *Kali Churan De,* (I. L. R., 13 Cal., 175), followed. *Tarini Charan Chowdhry* v. *Amulya Ratan Roy,* (I.L.R., 20 Cal., 857), referred to. *Held, per* Justice NANJUNDAYYA, that as section 145 required the Magistrate only to decide which of the parties was in actual possession, there could not logically be any provision in the Code to enforce such order except by prohibiting any interference with such possession. The disobedience of the Magistrate's order forbidding all disturbance of possession would be punishable and that seemed to be all that was necessary.

*Lingaiya* v. *Lingaiya* ... ... ... ... ... 105

5. ————————, section 193—*Criminal Procedure Code, sections 161, 164 & 364—Statements made before the Police—Recorded in a narrative form—Admissibility—False evidence.*] The accused was charged with having given false evidence either before a Police Officer under section 161 of the Code of Criminal Procedure or before a Magistrate. He was acquitted because the Magistrate was of opinion that the statement which the accused had made before the police was inadmissible in evidence as it was in a narrative form and did not show what questions were put to him. The Chief



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Court, in the exercise of its Revisional powers:—*Held*, that the decision of the Chief Court in Criminal Appeal No. 88 of 1899-1900 to the effect that "if the entire statement is made in answer to a single question put to a person by a Police Officer under section 161, it is sufficient to render such a person liable for a falsehood contained in such statement," should be followed.

IN THE MATTER OF *Venkatasawmi* ... ... ... ... 88

6. ——————, section 283—*Leaving a bullock cart unattended in a public road—Calf run over and killed—Whether an injury to the owner of the calf under the section.*] The accused was charged with having left his cart with bullocks yoked to it unattended in a public road with the result that the bullocks started and the wheels ran over a calf and killed it. He pleaded guilty and the Magistrate convicted him of an offence under section 283, Indian Penal Code, and passed a sentence of fine only. The District Magistrate being of opinion that the section was applicable only to acts causing damage or injury to persons using the road, referred the case to the Chief Court for orders under section 438, Criminal Procedure Code:—*Held*, that there was nothing in section 283, I. P. C., which showed that any harm illegally done to a man's property was intended to be excluded from its operation.

IN THE MATTER OF *Mahomed Sab* ... ... ... ... 92

7. ——————, section 353—*Assaulting a public servant—Arrears of Revenue—Amildar's order to attach moveables therefor—Sheikdar executing such order—Assault on him, whether an offence under the section.*] The accused was charged with assaulting a Sheikdar when he was executing an order of the Amildar for attaching the moveables belonging to the accused for arrears of Revenue due by him to Government. The Magistrate was of opinion that the Amildar was wrong in ordering attachment of moveables and that the Sheikdar was not engaged in the lawful discharge of his duty and therefore acquitted the accused:—*Held*, on a perusal of the records, that although the Amildar wrongly exercised his discretion in ordering the attachment of moveables, yet his order was legal and therefore the Sheikdar who was legally bound to carry it out, was assaulted in the execution of his duty as a public servant.

IN THE MATTER OF *Santhe Gowda* ... .. ... .. 60

8. ——————, sections 411 and 414—*Foreign Territory—Theft and dishonest retention of stolen property therein—Mysore Courts—Jurisdiction—Criminal Procedure Code, section 180, Illustration (b).*] The accused was charged before the Magistrate of Kolar Gold Fields with the offences of theft, dishonest possession of

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stolen property and assisting in the disposal of stolen property, committed in places beyond Mysore Territory. The Magistrate convicted the accused of offences under sections 411 and 414, Indian Penal Code, and sentenced him to rigorous imprisonment for 6 months. In support of the conviction in appeal, it was contended that the trial was good as the case came within the meaning of Illustration (b) to section 180 of the Criminal Procedure Code:—*Held*, that as the local limits within which the cattle were dishonestly retained or disposed of, were not situated within Mysore Territory though outside the Magistrate's jurisdiction, the Illustration (b) of section 180, Criminal Procedure Code, was not applicable and therefore the convictions of the accused under sections 411 and 414, Indian Penal Code, were set aside. *Reg* v. *Adivigadu*, (I. L. R., 1 Mad., 171), followed. *The Empress* v. *Sunker Gope*, (I. L. R., 6 Cal., 307), distinguished.

*Nallathambi* v. *Government* ... ... ... ... 79

INSOLVENCY APPLICATION—*See* CIVIL PROCEDURE CODE, section 344.

INSTALMENTS—*Decree for payment of a sum by instalments and in default a larger sum to become payable—Default in payment of instalments—Waiver by plaintiff of right to execute decree for the larger sum—Receipt by plaintiff of overdue instalments whether a waiver—Execution of decree.*] By a compromise decree, the defendants were directed to pay a certain sum of money by instalments and in case of default in the payment of any one instalment, a larger sum including the portion remitted should become payable by them to plaintiff. The first instalment fell due on the 15th October 1899 but the first payment was made on the next day and was Rs. 17-8-0 less, which deficiency was made good on the following day. The next instalment was due on 15th October 1900 but the payment was made on the 6th idem and was only Rs. 95 instead of Rs. 100. On the following day the defendants supplied to the plaintiff butter worth Rs. 4-8-0. The decree-holder applied on 11th March 1901 for the execution of the decree for the larger sum and after his death his sons repeated the application on 6th April 1901. The defendants contended that the plaintiff by accepting the first instalment though paid a few days after the due date and also the second instalment which was paid before the due date, had waived his right to execute the decree for the larger sum. *Held,* that the defendants having failed to secure a receipt in proper form or an acknowledgment that the amounts were paid in satisfaction of the 1st instalment, it could not be said that the judgment-creditor accepted the payments on account of the first instalment and waived his right to execute

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his whole decree. *Balaji Ganesh* v. *Sakharam*, (I. L. R., 17 Bom., 555), referred to.

*Ranga* v. *Lakshmya* .. .. .. ... ... 175

INTEREST—*See* INDIAN LIMITATION ACT, SCHEDULE II, ARTICLE 68.

INTEREST AFTER DUE DATE—*See* HYPOTHECATION (1).

INTEREST FROM DATE OF DECREE TO DATE OF PAYMENT—*See* CIVIL PROCEDURE CODE, section 209.

INTEREST FROM DATE OF SUIT TO DATE OF DECREE—*See* HYPOTHECATION (3).

INTERLOCUTORY ORDER PASSED IN AN APPEALABLE CASE—*See* CIVIL PROCEDURE CODE, sections 156, 622.

JODIDAR, SUIT BY, FOR POSSESSION OF INAM LANDS IN HIS VILLAGE—*See* CIVIL PROCEDURE CODE, section 43.

JODI VILLAGE.—*Shanbogue Inam—Questions regarding such Inams—Civil Courts—Jurisdiction to entertain suits involving those questions—Land Revenue Code, section 221, clause (a)—Government Notification, dated 9th September 1885.* In a suit by a Jodidar for the recovery of possession and produce of a land which the defendant (Shanbogue) alleged to be his Service Inam, it was contended by the latter that Civil Courts had no jurisdiction to entertain such suits:—*Held*, that section 221, clause (a) of the Land Revenue Code, and Notification of Government dated 9th September 1885, equally applied to village service in Government as well as alienated villages and therefore the opinion of the Sub-Judge that the suit was not cognizable by a Civil Court was in accordance with the Revenue Law in force in Mysore.

*Sambasastry* v. *Mallappa* .. ... ... ... ... 1

JOINT HINDU FAMILY—*See* SUCCESSION CERTIFICATE REGULATION.

JURISDICTION—*See* CRIMINAL PROCEDURE CODE, section 180, Illustration (*b*).

2. ——————*See* SMALL CAUSE COURTS.

3. ——————*See* CIVIL PROCEDURE CODE, section 16.

4. ——————*See* CRIMINAL PROCEDURE CODE, sections 180, 188.

5. ——————*See* CANCELLATION OF A PARTITION DEED AND RECOVERY OF PROPERTY, SUIT FOR.

6. ——————*See* LAND REVENUE CODE, section 193.

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7. ————of MAGISTRATES IN MYSORE TO TRY THE ACCUSED—*See* CRIMINAL PROCEDURE CODE, sections 188, 530 clause (*p*).

8. ————of MUNSIFF—*See* LAND REVENUE CODE, (REGULATION IV OF 1888), section 229.

LAND ACQUISITION REGULATION, sections 23 clause (1), and 24—*Market value of land at the time of Notification—Mode of calculating market value and amount of compensation.*] One Balekayee Sheshappa who was the holder of Survey No. 37 in the Guttahalli Village of the Bangalore Taluk, mortgaged it to one Mr. Sreenivasa Iyengar in 1857 for Rs 756. When the Western Extension of the Bangalore City was planned, the mortgagee transferred his title and interest to the Municipality and received the full amount of the mortgage money. The 1st, 2nd and 3rd defendants stated to be the grandsons and the 4th defendant the daughter-in-law of Sheshappa claimed compensation. An offer of Rs. 100 per acre was made to them in settlement of their claim in consideration of the delay caused to them, although the adjoining lands were acquired at rates varing from Rs. 70 to 102½ an acre. As this was not accepted, the Deputy Commissioner of Bangalore referred the matter to the Sub-Judge under section 18 of the Land Acquisition Regulation. The Sub-Judge decreed that compensation should be paid at the rate of Rs. 150 per acre with interest at 6 per cent per annum from the date of original acquisition in 1889. In appeal against the decree the defendants contended that the amount of compensation awarded was very inadequate and that the mode of calculating the same was incorrect:—*Held*, that, according to the strict provisions of the Regulation, the market value at the time of publication of the Notification must be adopted. *Held further*, that though, as a matter of fact, the Municipality in this case had added the land into the Western Extension and converted it into road and building sites, yet for purposes of calculation of the compensation, the land should be looked upon as mere dry land assessed to land revenue and subject to all incidents applicable to such land under the Land Revenue Regulation. *Held also*, that the contention of the appellants that they should be paid all the money realized by the Municipality by the sale of sites irrespective of the lands set apart for the roads or of the costs incurred in making the approach roads and parcelling them out into sites &c., could not therefore be accepted.

*B. Govinda Rao* v. *The Deputy Commissioner* .. ... 28

LAND REVENUE CODE, sections 96 and 97—*Survey settlement—Introduction into a Jodi village at the instance of a Jodidar—Enhancement*

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*of Revenue—Complaint to the Deputy Commissioner—Order refusing the relief prayed for—No appeal lies to the Chief Court.*] On the application of the Jodidar of Hommadevanahalli, Bangalore Taluk, Survey settlement was introduced into the village and the Jodi was raised. A tenant under the Jodidar complained to the Assistant Commissioner against the enhancement of Revenue, also alleging that there were several irregularities connected with the settlement. That Officer referred the petitioner to a regular suit. Thereupon, the tenant presented an appeal to the Deputy Commissioner who disposed of it under section 97 of the Land Revenue Code. Against this order, the tenant preferred this Miscellaneous Appeal to the Chief Court under section 96 of the Land Revenue Code:—*Held*, that in the present case no appeal lay to the Chief Court as the order did not come under section 97 of the Land Revenue Code and that if the appellant was aggrieved by the order, the remedy was apparently to petition the Government or to apply to the Deputy Commissioner for reconsideration or to file a formal suit under the provisions of section 88 or other sections in Chapter VII.

*Mahaboob Oonnisa Begam* v. *Seenappa* ... ... ... 59

2. ——— ———, section 193—*Mohatarfa—House-tax—Arrears—Sale of house by Revenue Authorities therefor—Jurisdiction—Validity—Irregularities in conducting or publishing the sale—Remedies of the defaulter—Chief Commissioner's Notification No. 265 of 28th September, 1860.*] The defendant's house was sold in a Revenue sale for arrears of mohatarfa tax payable thereon and the plaintiff became the purchaser. After the purchase, the plaintiff applied to the Deputy Commissioner for possession of the house but as the house had been locked by the defendant, the plaintiff was referred to a Civil Court. Thereupon the plaintiff filed the present suit for recovery of possession of the house and the kandayam paid by him to Government. The defendant contended that the sale was invalid as all the formalities required by law had not been observed:—*Held*, that section 193 of the Revenue Code was wide enough to include the present case, as mohatarfa house tax was a sum leviable as assessment under the terms of the Chief Commissioner's Notification No. 265 of 28th September 1860 which had the force of law and therefore the sale of the defendant's house by the Revenue Department for arrears of mohatarfa tax was valid. *Also*, that if there were irregularities such as a large sum than was legally due being mentioned, or some formality such as not declaring the occupancy forfeited under section 159 of the Revenue Code, they did not affect the jurisdiction or vitiate the sale and render it

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void and that the sale could be set aside only by appeal or a regular suit for the purpose.

*Abdul Amid Khan* v. *Venkataramanappa* ... ... ... 110

3. ——————, section 221 clause (a)—*Jodi village—Shanboguee Inam—Questions regarding such Inams—Civil Courts—Jurisdiction to entertain suits involving those questions—Government Notification dated 9th September,* 1835.] In a suit by a Jodidar for the recovery of possession and produce of a land which the defendant (Shanbogue) alleged to be his Service Inam, it was contended by the latter that Civil Courts had no jurisdiction to entertain such suits:—*Held*, that section 221 clause (a) of the Land Revenue Code, and Notification of Government dated 9th September, 1835, equally applied to village service in Government as well as alienated villages and therefore the opinion of the Sub-Judge that the suit was not cognizable by a Civil Court was in accordance with the Revenue Law in force in Mysore.

*Sambasastry* v. *Mallappa* ... ... ... ... ... 1

4. ——————, (Regulation IV of 1888), section 229—"*Officer of Government*"—*Nirganti of a village—Suit for damages for a tortious act against a Nirganti—Jurisdiction of Munsiff.*] In a suit for damages filed against a Nirganti, the Munsiff passed an order returning the plaint on the ground that a Nirganti was an 'officer of Government' within the purview of section 229 of the Land Revenue Code and that he had no jurisdiction to entertain the suit:—*Held*, that the words 'Officers of Government' used in section 229 of the Land Revenue Code applied only to Revenue Officers as defined in the Code and that a Nirganti, though he was generally under the control of the Revenue Department, could not be regarded as employed in or about the business of Land Revenue and that the order of the Munsiff returning the plaint must therefore be set aside. *Hanumanthappa* v. *Srinivasa Row*, (15 Mys. L. R., 243); *Shroff Runga Row* v. *Edigara Narasimha Gowda*, (2 Mys. Ch. Ct. R., 151), referred to.

*Mahommed Hussein* v. *Nanja* ... ... ... ... 312

LAND REVENUE REGULATION, section 79, para 2—*Ejectment—Defence of right of permanent occupancy—Are-kandayam tenure.*] In a suit for recovery of land the defendant pleaded that he held the land on are-kandayam tenure and that he had acquired a right of permanent occupancy in the land:—*Held*, that as the origin of the tenancy was deposed to by witnesses and as no special agreement as to its duration or local usage in regard to it had been alleged or proved, the defendant was not entitled to permanent occupation

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of the land. *Chick Bhadrappa* v. *Hanuma Reddi*, Mys. Ch. Ct. Second Appeal No. 91 of 1901-02, followed.

*K. Muniyappa* v. *Srinivasa Iyengar* .. .. ... 147

LAW APPLICABLE TO MYSORE—*See* HINDU LAW (6).

LICENSE—*See* EXCISE REGULATION.

LIMITATION—*Hindu Law—Alienation by a Hindu wife—Husband becoming an ascetic and leaving property in possession of wife—Adverse possession of wife for twelve years—Binding character of such alienation as regards husband and his alienees.*] Some properties which had been hypothecated to plaintiff by a Hindu wife (defendant No. 1) were subsequently gifted away by her husband (defendant No. 2) to other persons. In a suit on the hypothecation bond, the plaintiff alleged that as defendant No. 2 had long ago become a religious ascetic, his wife (defendant No. 1) had become the sole owner of the properties and that the debt was binding on defendant No. 2 and his donees. The defendants Nos. 2, 3 and 4 contended that defendant No. 1 had no right to hypothecate the properties and that the debt was not binding on them:—*Held*, (Justice NANJUNDAYYA, *dissenting*), that as defendant No. 2 renounced the world and lived as an ascetic leaving his wife (defendant No. 1) as the ostensible and unquestioned owner of his rights to his properties, her adverse possession for 12 years from about 1877 was sufficient to give her a title and to forfeit that of defendant No. 2, under the ordinary rule as to title by prescription.

*Chick Mariamma* v. *Vencatasamappa* ... ... ... 258

2. ———*Contribution Suit—Co-owner of a jodi village suing another after division—Tank—Cost of repairs thereto—Payment thereof by the former to Government—When cause of action arises—Land Revenue Code—Applicability to suits by private individuals.*] A co-owner of a jodi village sued another in 1902 for contribution of a portion of Rs. 548-6-7, which the former had paid to Government in 1895 for the cost of some repairs which the Government had executed to a tank in the village while it remained under their management, alleging that the cause of action arose in September 1901 when the defendant obtained a decree against plaintiff for his one-sixth of the said village. It was contended that the suit was barred by time:—*Held*, that the provisions of the Land Revenue Code which empowered Government to recover certain charges in the same manner in which arrears of Land Revenue might be recovered, did not apply to a claim made by a private individual and that the cause of action, if any, arose in June 1895 when the cost of repairs was paid by plaintiff to Government and therefore the suit was barred.

*Sreedhara Rao* v. *Sreenivasa Rao* ... ... ... ... 35

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————Act, schedule II, article 179, clause (2)—*Suit against several—Appeal against one—Execution of decree—Limitation—Starting point.*] The plaintiff brought a suit for recovery of money due on a hypothecation bond against the executant, his sons and a widow who claimed maintenance from the hypothecated property. It was decreed against the executants and his sons and against the hypothecated property excepting a house over which the widow was declared to have a prior charge on account of her maintenance. The plaintiff appealed from the decree in so far as it upheld the widow's claim but did not make the other defendants parties to the appeal. The Appellate Court modified the decree of the Court of First Instance. The plaintiff applied for the execution of the decree against all the defendants within 3 years from the date of the appellate decree but after 3 years from the date of the decree of first Court and it was contended that the execution had become time-barred so far as regards the executants and his sons as they were no parties to the appeal. The Lower Court dismissed the petition. The plaintiff (decree-holder) preferred this Miscellaneous Appeal against the aforesaid order of dismissal:—*Held,* that following the Full Bench decisions of the High Courts of Madras and Calcutta, the period of limitation would run from the date of the Appellate decree and therefore the application was not barred. *Gopal* v. *Gosaindas,* (I. L. R., 25 Cal., 594); and *Krishnama Chariar* v. *Mangammal,* (I. L. R., 26 Mad., 91), followed. *Mashiat-un-nissa* v. *Rani,* (I. L. R., 13 All., 12), dissented from.

*Naranappa v. Davangere Vasappa* ... .. .. ... 54

MADRAS CIVIL COURTS' ACT, section 12—*See* MYSORE CIVIL COURTS REGULATION I OF 1883, section 9.

MAINTENANCE—*Concubine—Illegitimate children—Suit by all of them jointly against the heirs of a deceased Hindu—Misjoinder of parties and causes of action—Ground of action common to all plaintiffs.*] The concubine of a deceased Hindu and her children jointly sued the deceased's heirs for maintenance. It was contended by the latter that each plaintiff had a separate cause of action and that each should file a separate suit:—*Held,* that there was no valid objection to the institution of a single suit since the ground of action was common to all the plaintiffs, *viz.*, that they have a right to charge the deceased man's property in the hands of his successors with their maintenance.

*Nagamma* v. *Bheema Rao* ... ... ... ... 61

2. ————*See* HINDU LAW (4).

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MALICIOUS PROSECUTION—*Damages, suit for—Reasonable and probable cause, want of—Burden of proof.*] Plaintiff who was prosecuted by defendant No. 1 was convicted by the 1st Court and acquitted in appeal. In a suit to recover damages brought by the plaintiff against the defendants, the latter pleaded that there was reasonable and probable cause for the prosecution:—*Held*, that the conviction of the appellant by the Magistrate who heard the evidence and saw the witnesses was evidence of the strongest possible character of reasonable and probable cause. *Bhadre Gowda* v. *Kalase Gowda*, (1 Mys. Ch. Ct. R., 68), approved. *Jadubar Singh* v. *Sheo Saran Singh*, (I. L. R., 21 All., 26), followed.

*Narasimhiah* v. *Hanumakka* ... ... ... ... 173

2. ——————— *Information to the Police—Prosecution by Police—Discharge of accused—Defamation—Suit for damages for loss of business and reputation against informant—Maintainability.*] The defendants gave some information to the Police regarding plaintiff and thereupon the Police searched the house of the plaintiff and prosecuted him for theft before the Assistant Commissioner and 1st Class Magistrate of Davangere Sub-Division. The Magistrate held an enquiry and discharged the plaintiff. The plaintiff subsequently brought this suit for recovery of damages from the defendants for loss of business and reputation suffered by him. The lower Court dismissed the suit on the ground that the defendants were not responsible for the acts done by the Police:—*Held*, Per Justice NANJUNDAYYA, that the plaintiff in a case like the present one, could maintain an action for defamation of character and all the consequences that followed the complaint to the Police would have to be considered in determining the nature and extent of the liability of the defendants. Per Justice STALEY, Chief Judge, that the plaintiff had a right to sue for damages in the present case. *Narasinga Row* v. *Muthaya Pillai*, (I. L. R., 26 Mad., 362); *Raghavendra* v. *Kashinath Bhat*, (I. L. R., 19 Bom., 717), referred to.

*C. Basappa* v. *Somanna* ... ... ... ... ... 251

3. ———————, SUIT FOR, DAMAGES FOR—*See* SMALL CAUSE COURTS.

MINOR—*See* CIVIL PROCEDURE CODE, sections 375, 462.

MINOR DEFENDANT—*See* CIVIL PROCEDURE CODE, section 443.

MINORS' RULES OF 1872—*Suit by guardian—Order of appointment not properly stamped—Dismissal of suit on that ground—Appeal—*

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*Court Fees Regulation III of 1900, schedule I, article 9.*] A suit brought by a guardian on behalf of a minor was dismissed on the ground that the plaintiff had not obtained a properly stamped certificate. On appeal, it was:—*Held*, that the Minors' Rules did not make it imperative that the order of public commission or any document should be produced in evidence before the manager could be admitted to sue, and all that the Court could require was proof of appointment which could be furnished by the copy of the order filed in this case and therefore the Munsiff's decision was liable to be reversed.

*Mallari* v. *Venkatappa* ... ... ... ... ... 40

MOHATARFA—*See* LAND REVENUE CODE, section 193.

MORTGAGE—*Indian Limitation Act, Schedule* II, *Article* 134—*Purchase from mortgagee—Suit for redemption by original mortgagor's sons—Adverse possession of purchaser.*] A certain land was mortgaged by plaintiffs' father to R in 1878. The 1st defendant purchased the land from R's undivided father under a registered sale deed dated 11th April 1881. The original mortgagor's sons filed the present suit for redemption in February 1901 against the purchaser and other persons who were in possession of the land. The defence was that the suit was barred by limitation:—*Held*, that the plaintiffs' suit was time-barred under Article 134 of Schedule II of the Limitation Act and must be dismissed. *Yesu Ramji Kalnath* v. *Balkrishna Lakshman*, (I. L. R., 15 Bom., 583), referred to.

*Thimmaroyappa* v. *Hanumantha* ... ... ... ... 306

2. ——————*Redemption*—"*Upakshaya Viradha*," *meaning of—Mortgagor undertaking to bear such charges—Jodi or land tax—Mortgagor's liability to pay jodi at the time of redemption.*] In a suit for redemption the mortgagee claimed re-embursement for the jodi amount paid by him to Government for the mortgaged property:—*Held*, that the words 'Upakshaya Viradha' did not include such a charge as land-tax or jodi which was an obligation attached to the holding but only referred to casual or additional rates and subscriptions that might be imposed. *Held further*, that the wording of the passage also showed that the mortgagor referred to charges that would be newly imposed and not to the burden of paying the jodi which was meant to be cast on the mortgagee when the property was given over to his possession and therefore the mortgagee was not entitled to the claim put forth in his written statement.

*Nanjunda Panditha* v. *Narasima Bhatta* ... ... ... 308

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3. ———*Second mortgage of the same property to the same person—Sale in execution of decree on second mortgage—Purchase by mortgagee decree-holder—Effect on decree on first mortgage.*] A decree-holder holding two decrees on separate bonds mortgaging the same property, in execution of the second decree purchased the property himself free from encumbrances. When he applied for the execution of the first decree, the judgment-debtor contended that the amount due under the first decree had become merged in the purchase made by the decree-holder in execution of the second decree:—*Held*, that as the mortgagee in the present case purchased under one mortgage decree, without notification of the second encumbrance under another mortgage decree, with premission of the Court, and presumably for the unencumbered value of the property, the mortgagor had no equity against him and the mortgagee could enforce the first decree for the balance due under it against the mortgagor. *Baburavji* v. *Ramji Svarupji*, (I. L. R., 11 Bom., 112); *Ballam Das* v. *Amar Raj*, (I. L. R., 12 All., 537), distinguished. *Sesha Ayyar* v. *Krishna Ayyangar*, (I. L. R., 24 Mad., 96), followed.

*Setty Mariappa* v. *Linganna* ... ... ... ... 197

4. ———*Civil Procedure Code, section 111—Waste committed by mortgagee in possession—Suit by mortgagee for money—Morgagor's right to claim a set-off for damage done to mortgaged property—Separate suit not necessary.*] In a suit by a mortgagee for money, the mortgagor's representatives alleged that the plaintiff had wantonly done damage to the mortgaged property and claimed a set-off for the compensation due to them for such damage from him. The Munsiff allowed the set-off and dismissed the plaintiff's suit. In appeal, it was contended on behalf of the plaintiff that the defendants were not entitled to any relief in this suit:—*Held*, that the defendants were entitled to have the damage ascertained in this case alone and have the amount deducted from the mortgage debt and that they need not be driven to a separate suit. *Ramunni* v. *Shanku*, (I. L. R., 10 Mad., 367), referred to. *Shiva Devi* v. *Jaru Heggade*, (I. L. R., 15 Mad., 290), followed.

*Chicka Honnayya* v. *Chennamma*... ... ... ... 294

MUKHTAR—*Right to appear for complainant—Magistrate refusing permission—Illegal—Chief Court Proceedings dated 9th December, 1897.*] The petitioner was practising as a Mukhtar in some Criminal Courts of the Mysore District. In a certain case, the Amildar Magistrate of Yellandur refused to permit the petitioner to appear for the complainant and rejected the Vakalatnama filed by him on the ground that the concession of allowing any person to appear

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for the accused could not be extended to the petitioner as he wanted to appear for the complainant. Against this order the petitioner preferred a Revision Petition to the Chief Court:—*Held*, that the opinion of the Magistrate that he had no power to permit any person other than an authorized person to act for the prosecution was erroneous.

IN THE MATTER OF *Y. Sreenivasa Iyengar* ... ... ... 102

MUNICIPALITY—See BANGALORE TOWN MUNICIPAL REGULATION, 1871, section 101.

MUNICIPAL REGULATION OF BANGALORE CITY, 1871, sections 2 and 148—*"In or near any street," meaning of—Omission to formally define a "Street" as required under section 2—Effect on conviction under section 148—Madras Municipal Act IX of 1867, section 158.*] The accused was charged before the City Magistrate of Bangalore with an offence under section 148 of the Bangalore Town Municipal Regulation for putting up a mud-roofed shed within his compound without obtaining a license and was acquitted on the ground that the shed was not built 'in or near any street' within the meaning of that section. In appeal against the order of acquittal, it was contended on behalf of Government that the facts of the case came within the definition of the expression 'in or near any street' given in section 2 of the said Regulation:—*Held*, that the Legislature intended that the provisions in Bangalore Town Municipal Regulation (1871) with regard to the words 'street' and 'road' should apply only to the streets and roads in portions of the Municipality which were specially defined by the Municipal Commissioners with the sanction of Government and therefore the provisions of section 148 could be enforced only in such specified parts of the Town of Bangalore. *Held also*, that as the Municipality had failed to formally define such parts, the acquittal of the accused was inevitable.

*Government of Mysore* v. *Basettappa* ... ... ... 218

MYSORE ARMS REGULATION VI OF 1890, section 14, clause (d)—*Possession of a gun without a license.*] The accused who was carrying a gun which his father had left on a threshing floor, was charged with having a gun without a license and thereby having committed an offence under section 14, clause (d) of the Arms Regulation VI of 1890. The Magistrate convicted and sentenced him to a fine of Rs. 15. The Chief Court in exercise of its Revisional powers:—*Held*, that the Legislature did not appear to have contemplated that each member of a household must take out a license for one and the same gun and therefore the conviction of the accused for being in

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possession of his father's gun without a separate license was set aside.

IN THE MATTER OF *Kada* ... ... ... ... ... 93

MYSORE CIVIL COURTS' REGULATION I OF 1883, section 9—*Cancellation of a partition deed and recovery of property, suit for—Jurisdiction—Subject matter of suit—Valuation thereof for determining jurisdiction—Madras Civil Courts' Act, section* 12.] The plaintiffs brought a suit in the Subordinate Judge's Court of Mysore for the cancellation of a partition deed and recovery of property worth Rs. 3,000 which was in the possession of the defendant. It was contended by the latter that the suit was beyond the jurisdiction of the Subordinate Judge as the property involved in the partition deed was worth more than Rs. 25,000:—*Held*, (BY THE FULL BENCH), that the term subject matter of suit used in the Civil Courts Regulation was intended to mean only the property or portion of property actually sued for and not the whole property regarding which enquiry would necessarily have to be made in connection with the suit. *Held also*, (Justice NANJUNDAYYA, *dissenting*), that as the plaintiffs in the present case wanted a declaration that the items of property in their possession as well as those sued for were the self-acquired property of their father, that they should be confirmed in possession of the former without being called upon to surrender any of them to the defendant and that they should be awarded the property in the possession of the defendant, the whole property minus Rs. 5,000 relinquished by the plaintiffs was the amount or value of the subject matter in suit and therefore the Sub-Judge had no jurisdiction to entertain the suit.

*Mirle N. Subba Rao* v. *Parvatamma* ... ... ... 177

MYSORE EXCISE REGULATION V OF 1901, sections 12 and 55, proviso—*Drawing toddy from date trees—Enhanced punishment—Liability.*] As the offence of manufacture of liquor is stated separately in the body of the section from that of tapping a toddy-producing tree or drawing toddy, it must be presumed that the Legislature did not intend to make the *proviso* applicable to the specific offences of drawing toddy or tapping a toddy-producing tree. The opinion of the Taluk Magistrate that the *proviso* applies only to manufactures of intoxicating drugs appears to be correct.

IN THE MATTER OF *Dodde Gowda* ... ... ... ... 85

2. ————————————, section 56, clause (b)—*Akkibhoja—Sale in an appointed place on a non-shandy day—Legality.*] *Held*, that the mere fact that Akkibhoja was sold on a day on which there was no shandy was insufficient to support the con-

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viction, if the sale was made in an appointed place, and that as the sale appeared to have been made in the shop described in the license, the conviction was set aside.

IN THE MATTER OF *Guttiyappa* ... ... ... ... 83

MYSORE MINES REGULATION, section 8—*Unlawful possession—Mining material—Presumption.*] The petitioner having been found in possession of 30 pink stearine candles with the Mysore Company's wick and 6 candle ends with the Oorigam Company's wick, without legal permit, the Special Magistrate, Kolar Gold Fields, convicted him under section 8 of the Mining Regulation for being in unlawful possession of mining material. On Revision, it was:—*Held*, that the exclusive possession was not proved by the prosecution witnesses and therefore the conviction was quashed. *Empress* v. *Malhari*, (I. L. R., 6 Bom., 781), followed.

*Abdul Rahim* v. *Government* ... ... ... ... 100

MYSORE REGISTRATION REGULATION, sections 76 and 77—*Suit to compel registration of document—Refusal to register it—Order passed by an Officer in charge of the Registrar's duties—Civil Court's power to question the legality thereof—Agreement to divide hear-after—Optionally registrable—Maintainability of suit.*] The plaintiff brought a suit under section 77 of the Mysore Registration Regulation to compel the registration of a document which was found to be merely an agreement to divide hereafter and as such optionally registrable. The Munsiff held that the order of refusal to register, having been passed by an Officer who was only in charge of the current duties of the Deputy Commissioner, was *ultra vires* and this opinion was confirmed by the District Judge in appeal. In Second Appeal, it was:—*Held*, that it was not open to a Civil Court to question the legality of an order passed by an Officer as Deputy Commissioner and District Registrar. *Also*, that when the registration of a document was optional and not indispensable for its operation, if otherwise enforcible, it did not seem proper to contend that 1st defendant was bound to comply with a wish of the plaintiff to impart additional force or validity to the document.

*Rahiman Bee* v. *Syed Mohudeen Sabi* ... ... ... 4

NEGLIGENCE—*See* BANGALORE TOWN MUNICIPAL REGULATION, 1871, section 101.

NIRGANTI OF A VILLAGE—*See* LAND REVENUE CODE, (REGULATION IV OF 1888), section 229.

NON-JOINDER OF PARTIES—*Joinder of co-plaintiff after expiry of time, effect of—Indian Limitation Act, section 22—Suit to recover a debt brought by one of two persons jointly entitled to sue.*] Where

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two undivided brothers were jointly entitled to recover a debt due to their deceased father, one of them alone brought a suit and when objection was taken by the defendants on the ground of non-joinder of parties, the other brother was added as co-plaintiff. The defendants contended that the suit was time-barred as more than three years had elapsed since the date of the bond when the other brother was added as co-plaintiff:—*Held*, that as the two plaintiffs were jointly entitled to the debt as members of an undivided Hindu family, the 1st plaintiff could not sue alone and therefore the claim was barred under section 22 of the Limitation Act when the 2nd plaintiff was added as a co-plaintiff. *Held also*, that the 1st plaintiff was not entitled to recover at least half the amount sued for as he could not claim in this suit his half share in the joint family property.

*Dodda Timma* v. *Mutta* ... ... ... .. ... 236

PARTNERS—*See* EXCISE REGULATION.

PARTNERSHIP—*See* INDIAN CONTRACT ACT, section 251.

PERMANENT OCCUPANCY, DEFENCE OF RIGHT OF—*See* LAND REVENUE REGULATION, section 79 para 2.

PLAINT TREATED AS AN APPLICATION UNDER section 244—*Civil Procedure Code, section 244—Suit to set aside execution sale—Irregularity in conducting sale—Inadequacy of price—Inference—Right of suit—Procedure in the absence of fraud.*] In a suit brought by a judgment-debtor to set aside a sale held in execution of a decree, he alleged that there were several irregularities in conducting the sale, that the price realised from the sale was too low and that the defendant (decree-holder) acted fraudulently by filing a false affidavit with regard to the property before the sale:—*Held*, that under the circumstances of the case the reasonable inference was that the property was sold at a price much below its true value in consequence of the irregularities in conducting the sale. *Venkatasubbaraya Chetty* v. *Zamindar of Karvetinagar*, (I. L. R., 20 Mad., 159); *Mahabir Pershad Singh* v. *Dhanukdhari Singh*, (I. L. R., 31 Cal., 815), followed. *Held further*, that in the present case no suit would lie and the plaintiff would have a remedy under section 244, Civil Procedure Code. *Held also*, that the plaintiff's suit should be treated as an application in execution and that the sale should be set aside. *Jhamman Lal* v. *Kewal Ram*, (I. L. R., 22 All., 121); *Briu Mahata* v. *Shyama Churn Khawas*, (I. L. R., 22 Cal., 488); *Lalman Das* v. *Jagan Nath Singh*, (I. L. R., 22 All., 376), followed.

*Sheik Imam Sab* v. *Patail Ajje Gowda* .. ... ... 131

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PROCEDURE—*See* CIVIL PROCEDURE CODE, section 23.

2. ———*See* CONSENT OF BOTH PARTIES OBTAINED IN ORIGINAL COURTS.

3. ———*See* CONTRIBUTION SUIT BASED ON AN EXPRESS CONTRACT.

PROCEDURE WHEN DEFENDANT DOES NOT APPEAR—*See* CIVIL PROCEDURE CODE, sections 100, 146 and 152.

PROMISSORY NOTE—*Indorsee suing maker and indorser—Nature of contract between indorser and indorsee—Indorser when exempted from liability.*] The plaintiff who was the indorsee of a promissory note, sued the indorser and the maker's legal representative for the recovery of money due thereon. It was contended on behalf of the indorser (Bank) that the plaintiff had willingly received the promissory note in full satisfaction of the debt due to him from the Bank and that its liability had thereby ceased:—*Held*, that the indorsee intended to recover his debt from the maker only and not from the indorser (Bank) and therefore the decision of the District Judge making it also liable should be set aside.

*Lakshmi Narayana Swami Bank* v. *Madappa* ... ... 8

2. ———*See* STAMP ACT, 1879.

3. ———*See* STAMP REGULATION II OF 1900, sections 2 (22), 36, Schedule I, Articles 47, 12 (*b*).

PROMISSORY NOTES EXECUTED BY MOTHER—*See* CIVIL PROCEDURE CODE, section 456.

PURCHASE BY HYPOTHECATEE OF A PORTION OF HYPOTHECATED PROPERTY—*See* HYPOTHECATION (8).

PUROHIT AND JOYISA—*Suit for declaration of right to officiate and for damages for loss of fees.*] The plaintiff sued for establishing his right to the Pourohitya and Jyotishya in the town of Yellandur and for recovery of damages from the 1st defendant who had wrongfully received the emoluments on a festive occasion:—*Held* that a claim of such a general and indefinite nature required very strong evidence of title to sustain it and that the fact that the plaintiff had been acting as Purohit in the place for whatever length of time was not sufficient to entitle him to a decree that no others might perform similar duties within the area claimed by him.

*Sreecanta Sastry* v. *Pandu Ranga Upadhya* ... ... 7

RAZINAMA DECREE—*See* CIVIL PROCEDURE CODE, sections 375, 462.



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**Reasonable and probable cause, want of**—*See* Malicious prosecution.

**Redemption**—*See* Mortgage.

**Registration Act, 1877**, section 17 clause (*b*)—*Unregistered document styled a receipt—Right to obtain another document created thereby—Title of parties also declared in the document—Evidence—Admissibility.*] In a suit by the purchaser of a house for recovery of possession, the defence was that the house had been resold to one of the defendants and in support of this, a document which was styled a receipt was produced but the same was not admitted in evidence for want of registration. In appeal, it was contended that the document did not require registration:—*Held*, that as the document declared the plaintiff's title by his former purchase and also declared it assigned to defendant No. 2 by the latter purchase on the date of the document, it was a document requiring registration under sub-section (b) of section 17, of the Indian Registration Act, and therefore the lower Court was right in holding that the document was inadmissible for want of registration. *Hurnandun Singh* v. *Jawad Ali*, (I. L. R., 27 Cal., 468), distinguished.

*Dodda Siddappa* v. *Doddaiya* ... ... ... ... 112

**Regulations**—

*See* Bangalore Town Municipal Regulation.

*See* Court Fees Regulation.

*See* Land Acquisition Regulation.

*See* Land Revenue Regulation.

*See* Mysore Arms Regulation.

*See* Mysore Civil Courts Regulation.

*See* Mysore Excise Regulation,

*See* Mysore Mines Regulation.

*See* Mysore Registration Regulation.

*See* Stamp Regulation.

*See* Succession Certificate Regulation.

*See* Whipping Regulation.

**Relief to plaintiff on general principles**—*See* Contribution suit based on an express contract.

**Rent, suit for**—*Indian Contract Act*, section 56—*Compulsory evacuation of shops by Plague Authorities—Tenancy how affected.*] The

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defendant who had taken up some mandi shops from plaintiffs for rent was forced to evacuate them by the Plague Authorities under an order of Government. When the plaintiff sued for arrears of rent, the defence was that the liability to pay rent had ceased as the defendant was not in possession of the shops :—*Held*, that the occupation of the shops became impossible by reason of the order of the Plague Authorities insisting upon their evacuation, and therefore the tenancy really came to an end when they were ordered to be evacuated. *Merwanji Mancherji Cama* v. *Syed Sirdar Ali Khan*, (I. L. R., 23 Bom., 510), distinguished.

*Narappa* v. *Ramayya* ... ... ... ... ... 170

RESTORATION AFTER DELIVERY, POWER TO ORDER—*See* CRIMINAL PROCEDURE CODE, sections 517, 520.

REVENUE OFFICER—*Stamp vendor—Embezzlement in stamps—Land belonging to him sold under an order of the Deputy Commissioner—Dispossession by purchaser—Suit for possession and mesne profits against purchaser.*] Plaintiff was a salaried stamp vendor at Shimoga, working under the orders of the Treasury Officers for the time being, the father of the defendant having been one of them. The plaintiff falsified his indents and accounts and thereby induced the Treasury Officer to entrust him from time to time with stamps of large value. Having by such deception, obtained the stamps, he misappropriated the sale proceeds to the extent of Rs. 3,732-5-0. On the embezzlement being discovered, the plaintiff was prosecuted and convicted and the Revenue Department sold his landed property to recover the amount misappropriated. In the course of that sale, the defendant's father purchased the land in suit for Rs. 1,200 on the 11th June 1894 and was put in possession on the 20th idem. The plaintiff brought a suit for recovery of the aforesaid land, alleging that the defendant's father had wrongfully dispossessed him of the land, in a so-called sale which was illegal and contrary to law. Both the lower Courts were of opinion that the plaintiff was entitled to succeed. In Second Appeal, it was contended by the defendant that the Deputy Commissioner was competent to sell the property under the provisions of section 24, Land Revenue Code, and that the Lower Courts should have made the payment of purchase money by the plaintiff to defendant a condition precedent to the former's recovering the land from the latter :—*Held*, that a careful consideration of the definition of the word "Revenue Officer" and of the provisions of section 24, Land Revenue Code, would show that there was no force in the contention that the stamp vendor could be regarded as a Revenue Officer. *Held further*, that as there was nothing in the circumstances of the

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case from which it could be presumed that the defendant paid the purchase money at the implied request of the plaintiff or to protect his interests, the defendant was not entitled to insist on re-payment by plaintiff of the sale proceeds in this case.

*K. Hanumantha Rao* v. *Batni Venkoba Rao* ... ... ... 13

REVIEW OF JUDGMENT—*See* CIVIL PROCEDURE CODE, section 623.

REVISION—*See* CIVIL PROCEDURE CODE, sections 156, 622.

2. ———— *See* CRIMINAL PROCEDURE CODE, sections 417, 439.

REVISION AGAINST ORDER OF REFUSAL—*See* CIVIL PROCEDURE CODE, sections 82, 622.

REVISIONAL JURISDICTION—*See* CIVIL PROCEDURE CODE, sections 588, 622.

RIGHT OF PRIVATE DEFENCE—*See* INDIAN PENAL CODE, section 160.

SECOND APPEAL—*See* COSTS (1).

SMALL CAUSE COURTS—*Jurisdiction—Damages for malicious prosecution, suit for—Provincial Small Cause Courts Act XI of* 1865 *in force in Mysore*.] *Held*, that the judgment of the Chief Court in Civil Revision Petition No. 64 of 1900-01, holding that Act XI of 1865 (Provincial Small Cause Courts Act) was in force in Mysore had never been dissented from.

*Ebrahim Sah* v. *Gopala Shetty* ... ... ... ... 210

SMALL CAUSE SUIT—*Death of defendant—Application to be brought on record as representatives—Order refusing permission—Appeal—Civil Procedure Code, sections* 368, 588—*Civil Procedure Code Amendment Regulation VII of* 1892.] The defendant in a small cause suit having died, some persons alleging themselves to be her daughter's sons applied to the court for permission to be brought on record as the deceased woman's legal representatives; but the application was rejected on the ground that they were not the daughter's sons of the deceased defendant. The petitioners having preferred an appeal against the order, it was:—*Held*, that no appeal could be admitted against the order of the Munsiff on the Small Cause side.

*Munisami* v. *Nanjee* ... ... ... ... ... 191

SPECIFIC RELIEF ACT, section 39—*Civil Procedure Code, section* 16—*Jurisdiction—Decree affecting property outside territorial jurisdiction of Court—Effect as between parties to the decree—Estoppel—Right of a person not a party thereto to question its legality—Cancellation of decree, suit for—Cause of action—*

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*Discretion of Court—Fraud alleged but not proved—Effect.*] Some properties were hypothecated by the 2nd defendant to the 1st defendant's predecessor in interest and afterwards three of them were sold to plaintiff by the 2nd defendant and the Deputy Commissioner of Mysore who had attached them for arrears of Excise duty payable by the 2nd defendant to Government. Some time after, the 1st defendant sued the 2nd defendant for recovery of the debt from all the hypothecated properties and a Razinama decree was passed by the Principal Munsiff of Mysore, directing the sale of all the mortgaged properties though all of them were situated outside the Munsiff's territorial jurisdiction. The 1st defendant applied to the Nanjangud Munsiff's Court for executing the decree and the latter ordered the sale of the properties. Thereupon, the plaintiff brought a suit for the cancellation of the decree so far as it affected the aforesaid three properties alleging that the said decree was passed without jurisdiction and that his rights in the properties remained unaffected:—*Held*, that the decree was not null and void as between defendant No. 1 and defendant No. 2 and that as the latter had not appealed against it, he was estopped from saying that he was not bound by it. *Gomatham Alamelu* v. *Komandur Krishnamacharlu*, (I. L. R., 27 Mad., 118), followed. *Vishnu Sakharam Nagarkar* v. *Krishnarao Malhar*, (I. L. R. 11 Bom., 170); *Lakshmishankar Devshankar* v. *Vishnuram*, (I. L. R., 24 Bom., 77), referred to. *Held further*, that since the plaintiff did not consent to the decree in the suit to which he was not a party, there was nothing to prevent his questioning the legality of the decree as affecting his interests. *Held also*, that, merely by the passing of the decree for sale against defendant No. 2, the plaintiff obtained no cause of action for the present suit and before he could bring such a suit, it was necessary for some circumstances to come into existence, necessitating his application for a declaratory decree, some act hostile to and invading his title, constituting such an otherwise inevitable injury, such an apprehension of serious injury that a Court could properly exercise its discretion to prevent it. *Subbaraya Mudali*, v. *The Sub-Collector of Chingleput*, (I. L. R., 6 Mad., 307), referred to. *Held also*, that though the plaintiff had not proved fraud in the decree, he had proved his right to a relief consistent with the plaint and evidence and that he might therefore be properly allowed a decree declaring that the decree for sale in Original Suit No. 574 of 1895-96 did not affect his right in the property in suit.

*Rajagopalachar* v. *Sheshachallam Mudaliar*... ... ... 122

2. ——————, sections 9, 42—*Declaratory suit—Suit for declaration of title and confirmation of possession—"Consequential*

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*relief"—Maintainability—Gift when passing title—Hindu Law.*] The first defendant obtained a decree for possession under section 9 of the Specific Relief Act against the plaintiff who was in possession of the suit land. Subsequently before the decree was executed by the first defendant, the plaintiff brought a suit against her for a declaration of his title to the suit land and for confirmation of his possession of the same. The 1st defendant contended among other things that the suit being merely for a declaration was not maintainable. The lower Appellate Court upheld the contention and refused to give plaintiff an opportunity to amend the plaint. In Second Appeal:—*Held*, that there was nothing in the terms of section 9 of the Specific Relief Act which required that a prayer to recover possession should be attached to a prayer for establishment of title if the plaintiff was already in physical possession. *Held further*, that the plaintiff's prayer for a decree that his possession may not be disturbed amounted to a prayer for an order in the nature of an injunction, a prayer for consequential relief under section 42 of the Specific Relief Act. *Held also*, that in order to complete a gift and make it valid such that the donee would acquire a title which he could convey, it was necessary that the donor should have done all that she could to complete the gift and that since the 1st defendant did not give the donee possession and withdrew her gifts subsequently, the gift was intentionally never completed by the 1st defendant and therefore it passed no title.

*Naranappa* v. *Lingamma* ... ... ... .. ... 247

STAMP ACT, 1879—*Promise to pay money to a certain person—Construction of document—Promissory note—Bond—Agreement not otherwise provided for.*] The words of a certain document were as follows:—" . . . in accordance with the promise already made to pay you a sum of Rs. 2,000 as a present, I shall pay to you. You may keep this with you as evidence." The question for consideration was whether the document was a promissory note or a bond. *Held*, that the document did not fall under the designation of a promissory note as generally understood. *Held also*, that though the document would be a bond as generally understood, yet as it could not be brought under any of the three clauses defining a 'bond' in the Stamp Act, the District Judge was right in holding that it was an agreement not otherwise provided for.

*Padmaraja Pandit* v. *Sreekantiah* ... ... ... ... 190

STAMP REGULATION II OF 1900, sections 2 (22), 36, Schedule I, Articles 47, 12 (b), 60—*Promise to pay money on demand on a certain day*

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—*Promissory note—Agreement—Evidence—Admissibility.*] The plaintiff sued for the recovery of Rs. 55 due on a document bearing a stamp of one anna only and containing a promise by the defendant to pay the sum on demand on the 48th day after its execution and obtained a decree. In Revision, it was contended that the document was inadmissible in evidence as it was not properly stamped as required by law :—*Held*, that the document in question was a promissory note under section 2 (22), Stamp Regulation II of 1900, and that the proper stamp under Articles 47 and 12(b), Schedule I of that Regulation was two annas. *Held also*, that since the document had been admitted in evidence, the admission could not be called into question.

*Naranaiya* v. *Sabhapathi Modliar* ... ... ... 206

STAMP VENDOR—*See* REVENUE OFFICER.

STEP IN AID OF EXECUTION—*See* INDIAN LIMITATION ACT, 1877, SCHEDULE II, ARTICLE 179 (4).

SUB-JUDGE—*Small cause decree passed by him—Munsiff subsequently invested with small cause jurisdiction—Applications for execution presented to the latter—Final application to execute presented to Sub-Judge after three years from date of decree—Proper Court to continue execution proceedings.*] There is room for difference of opinion on the question whether the decree ought to be executed by the Subordinate Judge or by the Munsiff. Until the question is decided by a Full Bench, the latest ruling by *Mr. Best, C. J.* and *Mr. Narahari Rao, J.* "that the Munsiff had jurisdiction to execute the decree" may be followed. Miscellaneous Appeal No. 22 of 1901-02.

*Chikka Muniyappa Setti* v. *Muni Thimma*... ... ... 66

SUCCESSION CERTIFICATE REGULATION—*Regulation VII of* 1901, *section* 4—*Joint Hindu Family—Decree obtained by a deceased member thereof—Execution applied for by surviving members—No necessity for certificate—Presumption as to nature of debt where family is joint.*] The Petitioners who claim the money as surviving members of a Joint Hindu Family, do not claim it as the effects of their deceased father and consequently their petition is not governed by the Regulation. The corresponding Act (Act VII of 1889) which is in force in British India, is, according to the opinion of all the High Courts, confined to the case in which the claim is to the "effects," of the deceased and not to family property where the claim is by right of survivorship. (*See* I. L. R., 20 M. 282; 22 M. 380; 19 B. 338; 17 A. 578 and 23 C. 912.) It is not necessary that it should appear on the face of the bond or decree that the

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debt is due to the joint family and that fact may be established by other evidence.

*Subba Rao* v. *Sheshanna* ... ... ... ... ... 73

2. ———————————, VII OF 1901, section 9—*Court issuing certificate—Collections of debts due to the deceased person —Power to call upon sureties to render an account thereof.*] The holder of a succession certificate applied to the Court under section 9, Regulation VII of 1901, to call upon his sureties to produce the amounts of money which they had collected from the debtor of the deceased person and to invest the same in the Savings Bank. The District Judge, being of opinion that even if the allegation be true, he had no power to order the sureties to pay the amount into Court, dismissed the application. The applicant preferred a Revision Petition to the Chief Court:—*Held*, that section 9 did not clearly apply to the present case and that there was apparently no general rule or law authorizing the Court which issued a certificate of heirship, to call upon the sureties to render an account of the collections which should be made by the person to whom the certificate was granted on their security.

*Hoochayya* v. *Lakkanna* ... ... ... ... ... 67

SURETY—*See* CIVIL PROCEDURE CODE, sections 253, 545 and 546.

2. ———*See* INDIAN LIMITATION ACT XV OF 1877, section 21.

SURETY'S LIABILITY WHETHER AFFECTED BY SUCH DECREE—*See* CIVIL PROCEDURE CODE, section 253.

SURVEY SETTLEMENT INTRODUCED INTO AN ALIENATED VILLAGE—*See* CIVIL PROCEDURE CODE, section 43.

TRANSFER APPLICATION—*See* CIVIL PROCEDURE CODE, section 23.

VARIANCE BETWEEN PLEADINGS AND PROOF—*See* CONTRIBUTION SUIT BASED ON AN EXPRESS CONTRACT.

VERIFICATION OF PLAINT—*See* CIVIL PROCEDURE CODE, sections 100, 146 and 152.

WAIVER, RECEIPT BY PLAINTIFF OF OVERDUE INSTALMENTS WHETHER A —*See* INSTALMENTS.

WASTE COMMITTED BY MORTGAGEE IN POSSESSION—*See* MORTGAGE (4).

WHIPPING REGULATION V OF 1903, section 7, clause (b)—*Sentence of fine passed by third Class Magistrate—Non-payment of fine—Magistrate ordering production of accused before District Magistrate for action under the Whipping Regulation—Legality.*]

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Where two persons were charged with the offence of theft, the Amildar-Magistrate who tried the case convicted both the accused persons and sentenced them to fines of Rs. 6 and 4 respectively. With regard to the 2nd accused, who was about 12 years old, the Magistrate ordered that in default of payment of fine he may be sent to the District Magistrate for being dealt with under the Whipping Regulation. On a reference by the District Magistrate :—*Held*, that the order of the Amildar-Magistrate regarding the production of the 2nd accused before the District Magistrate was not in accordance with law and must be set aside.

IN THE MATTER OF *Sanna* ... ... ... ... ... 331

WILL, CONSTRUCTION OF—*See* HINDU LAW (6).

*Words and Phrases*—

"CHARGE" MEANING OF—*See* CRIMINAL PROCEDURE CODE, (ACT X OF 1882), section 240.

"CONSEQUENTIAL RELIEF"—*See* SPECIFIC RELIEF ACT, sections 9, 42.

"COURT"—*See* CRIMINAL PROCEDURE CODE, sections 176, 476.

"IN OR NEAR ANY STREET" MEANING OF—*See* MUNICIPAL REGULATION OF BANGALORE CITY, 1871, sections 2, 148.

"MAY PROCEED EX-PARTE" MEANING OF—*See* CIVIL PROCEDURE CODE, sections 100, 146 and 152.

"MISCONDUCT OF ARBITRATORS"—*See* CIVIL PROCEDURE CODE, section 521, clause (*a*).

"OFFICER OF GOVERNMENT"—*See* LAND REVENUE CODE, (REGULATION IV OF 1888), section 229.

"SUBJECT MATTER OF SUIT"—*See* CANCELLATION OF A PARTITION DEED AND RECOVERY OF PROPERTY, SUIT FOR.

"SUCCESSOR IN OFFICE" MEANING OF—*See* CRIMINAL PROCEDURE CODE, section 389.

"UPAKSHAYA VIRADHA" MEANING OF—*See* MORTGAGE (2).

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